

TASMANIA
LAW REFORM
INSTITUTE

**Problem Trees and Hedges: Access to
Sunlight and Views**

FINAL REPORT NO 21

JANUARY 2016

Contents

Information about the Tasmania Law Reform Institute	iv
Acknowledgments	iv
Background to this Report	iv
Summary of Recommendations	vi
Part 1: Introduction	1
1.1 Background	1
1.2 Outline of the Report	3
1.3 Scope	3
Part 2: The Current Law	4
2.1 Introduction	4
2.2 The current law and associated problems	4
2.3 Conclusion	9
Part 3: The Need for Reform	10
3.1 Introduction	10
3.2 Extent of the issue in Tasmania	11
3.3 Conclusion	15
Part 4: The Law in Other Jurisdictions	17
4.1 Introduction	17
4.2 New South Wales	17
4.3 Queensland	21
4.4 Victoria	25
4.5 International examples	26
Part 5: Options for Reform	32
5.1 Introduction	32
5.2 Option 1: Make no change and rely on existing law	32
5.3 Option 2: The Victorian model of dispute resolution	33
5.4 Option 3: Develop a statutory scheme	36
5.5 Option 4: Extension of the abatement notice provisions under the <i>Local Government Act 1993</i> (Tas)	66
5.6 Option 5: A hybrid or alternative option?	67
Appendix A	69

Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself. The Institute's Director is Ms Terese Henning of the University of Tasmania. The members of the Board of the Institute are Ms Terese Henning (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice Stephen Estcourt (appointed by the Honourable Chief Justice of Tasmania), Dr Jeremy Prichard (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (community representative), Mr Rohan Foon (appointed by the Law Society of Tasmania) and Ms Kim Baumeler (appointed at the invitation of the Institute Board).

Acknowledgments

This Final Report was prepared for the Board by Mr Bruce Newey. The Issues Paper that preceded it was prepared for the Board by Ms Pip Shirley. Supervisory Assistance was provided by Mr Lynden Griggs. Valuable feedback was provided by the Institute's Director, Ms Terese Henning, Executive Officer, Dr Helen Cockburn and Tasmania Law Reform Institute Board members.

Background to this Report

This project considers the remedies available to a property owner affected by a neighbour's tree or hedge which creates a barrier to sunlight or to a view. The issue was referred to the Institute by Dr Vanessa Goodwin MLC after an approach by a constituent. Following the initial approach by the constituent, Dr Goodwin was provided with some 21 other examples of problem hedges from Southern Tasmanian residents. Dr Goodwin reported on the issue to the Legislative Council which, on 15 May 2012, moved the following motion:

That the Legislative Council:

- Notes the problem caused by trees or hedges which obstruct the views or sunlight of neighbouring residents; and
- Notes the lack of redress available to residents whose enjoyment of their property is reduced due to the presence of trees or hedges on a neighbouring property which block their sunlight or views; and
- Notes that there is also a need to recognise the right of a resident to establish and maintain a garden on their property, which may include the use of trees and hedges to provide some form of privacy screen; and calls on the government to investigate this issue further to identify a suitable mechanism to resolve disputes between neighbours which involve competing interests concerning trees and hedges.

The matter was subsequently referred to the Institute which agreed to examine the need for law reform in this area.

The Institute received submissions to the Issues Paper from:

Ainsleigh Villas Body Corporate	Mr Eric Lockett
Mr and Mrs Bill and Vicki Beresford	Ms June Noble
Ms Emma Birch	Mr and Mrs Robin and Lorraine O'Byrne
Mr Paul Brunyee	Ms Lucy Palmer
Clarence City Council	Mr Michael Payne
Mr Peter Donnelly	Mr Bruce Scott
Mr and Mrs Seamus and Jan Elder	Ms Betty Smith
Mr and Mrs Ted and Edna Goggins	Mr Steven Stafford
Mr John Green	Mr Don Stirling
Mr Geoff Heriot	Mr Ovie Taylor
Mr and Mrs Trevor and Jenny Jones	Mr Wayne H Williams
Local Government Association Tasmania	

The Institute received 18 anonymous submissions (the names of those who submitted anonymously are on file with the Institute).

This Final Report was preceded by the publication of an Issues Paper (Tasmania Law Reform Institute, *Neighbour's Hedges as Barriers to Sunlight and a View*, Issues Paper No 19 (2014)) and a period of public consultation. The production of this Report has significantly benefitted from consultations that were held with the Local Government Association of Tasmania, representatives from the Department of Justice, the Resource Management and Planning Appeals Tribunal, the Magistrates Court, the Planning Commission as well as local councils. The Institute wishes to thank all those who took the time to respond to the public consultation and to meet with the Institute to discuss the matters raised in the Issues Paper.

The Final Report is available at the Institute's web page at <http://www.utas.edu.au/law-reform/> or can be sent to you by mail or email.

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Summary of Recommendations

Recommendation 1	<ul style="list-style-type: none"> • That an accessible and inexpensive statutory scheme to address trees and hedges on neighbouring land that obstruct the access of sunlight or a view be implemented in Tasmania. • That any such scheme include provisions that recognise the importance of trees and hedges to the community and balance the respective rights of property owners.
Recommendation 2	That the existing law no longer be the exclusive source of the law in relation to disputes between neighbours about trees and/or hedges.
Recommendation 3	<ul style="list-style-type: none"> • That a model similar to the Victorian model of dispute resolution for resolving neighbour disputes about trees and hedges not be implemented in Tasmania. • That parties be required to engage in some form of ADR in relation to the dispute (in line with current court and tribunal practices) before a matter can progress to a hearing.
Recommendation 4	That jurisdiction to hear disputes about trees and hedges on neighbouring land that obstruct the access of sunlight or views be vested in the Resource Management and Planning Appeals Tribunal.
Recommendation 5	<ul style="list-style-type: none"> • If legislation is implemented, it should include a requirement that an applicant has made reasonable attempts to resolve the tree or hedge dispute before the court or tribunal may make an order in respect of the tree or hedge. • If parties have engaged or attempted to engage in ADR, this should be regarded as evidence that reasonable attempts have been made to resolve the dispute.
Recommendation 6	That the obstruction caused by trees or hedges to the access of sunlight or a view must be ‘severe’ before intervention is warranted.
Recommendation 7	That in any scheme that is adopted, the obstruction of sunlight caused by a neighbour’s tree must be to a dwelling, including the roof of the dwelling, on the applicant’s land.
Recommendation 8	That malicious intent in the planting or non-maintenance of a tree or hedge not be required (nor a consideration) before an order may be made in respect of that tree or hedge.
Recommendation 9	<ul style="list-style-type: none"> • The reference to an ‘obstruction’ in any scheme that is adopted to address this issue should refer to both the obstruction of sunlight and of a view. • That consideration be given to excluding trees or hedges planted by local government or other relevant bodies pursuant to environmental or other policy objectives.

Recommendation 10	If a legislative scheme is adopted to address trees or hedges that obstruct sunlight or views, that it not apply to trees or hedges that are below a height of 2.5 metres.
Recommendation 11	That any legislative scheme adopted to address this issue be applicable to single trees, hedges and other relevant vegetation, whether or not the tree, hedge or other vegetation is self-sown or purposely planted.
Recommendation 12	That any prospective scheme apply to land in any zone, but that the zoning of the land on which the tree or hedge is situated be a factor that must be considered by the decision maker.
Recommendation 13	<ul style="list-style-type: none"> • That applications in respect of trees or hedges that obstruct the access of sunlight or views not be restricted to properties that are adjoining. • That there be a requirement for the decision maker to consider the proximity of the trees or hedges to the dwelling on the applicant's property. If properties are not adjoining then it is less likely that an obstruction will be severe.
Recommendation 14	That the decision maker be required to consider whether the trees or hedges that are the subject of an application existed prior to the applicant's purchase or occupation of the dwelling.
Recommendation 15	<ul style="list-style-type: none"> • That orders made in respect of trees or hedges are not binding on subsequent owners of the land to which the order relates. • That a publicly available database of orders that are made in respect of trees or hedges be established.
Recommendation 16	<ul style="list-style-type: none"> • That the decision maker be given discretion to allocate the burden of any costs associated with carrying out an order in respect of a tree or hedge to either the applicant or the respondent or to both the applicant and the respondent. • That a party's costs in relation to the proceedings be borne by that party unless circumstances warrant the allocation of those costs (or some portion thereof) to the other party. • That consideration be given as to whether legal representation be permitted as a matter of course and whether, if required, experts be provided to the parties by the relevant decision making body.
Recommendation 17	That prior to granting an order, the decision maker be required to consider whether authorisation to interfere with the tree or hedge would otherwise be required under another law.

Recommendation 18	<ul style="list-style-type: none">• That the abatement notice provisions in the <i>Local Government Act 1993</i> (Tas) not be extended to cover tree or hedge disputes between private landowners.• That if separate legislation is implemented, local government not be made responsible for tree or hedge disputes.• If a scheme is adopted, that consideration is given to providing local government with the relevant means to inform the public about trees and hedges and the settlement of disputes under any such scheme.
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Part 1

Introduction

The ... right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land ... The laws of England are ... extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land.¹

In the real world neighbors often have distinctive and special relationships. They have some sort of social contact, whether friendly or otherwise. They almost inevitably have mutual interests that stem from their proximity... Rules that reflect the special relationship between neighbors follow what I call the “friend model” of the law of neighbors. Of course, the word “friend” does not fully reflect the nature of many neighbor-neighbor relationships, for some of those relations are merely civil and some are downright hostile. But even neighbors in these relationships are connected up in meaningful personal ways that sharply differentiate them from strangers. The term “friends,” in my view, captures this reality about as well as is possible.²

1.1 Background

1.1.1 This project arose from a specific conflict over a hedge which ran along the boundary between two suburban properties located near Hobart. The residents of one of the properties complained that the height of the hedge obstructed sunlight to their dwelling and blocked their view. Attempts to negotiate a solution with the neighbouring homeowner were unsuccessful and there was no suitable mechanism for resolution through local government, state government, or the legal system. Although a restrictive covenant limits the height of buildings in the area, it does not cover vegetation.

1.1.2 The property owners contacted their local member, Dr Vanessa Goodwin, MLC who took up the issue on their behalf. Subsequently, a further 21 instances of residents reporting problems with a neighbours tree and/or hedge were uncovered across several southern municipalities. Dr Goodwin voiced her concerns in the Legislative Council and as a result, on 15 May 2012, the Legislative Council moved the following motion:

That the Legislative Council:

Notes the problem caused by trees or hedges which obstruct the views or sunlight of neighbouring residents; and

Notes the lack of redress available to residents whose enjoyment of their property is reduced due to the presence of trees or hedges on a neighbouring property which block their sunlight or views; and

Notes that there is also a need to recognise the right of a resident to establish and maintain a garden on their property, which may include the use of trees and hedges to provide some form of privacy screen; and calls on the government to investigate this issue further to identify a suitable mechanism to resolve disputes between neighbours which involve competing interests concerning trees and hedges.

¹ William Blackstone, *Commentaries on the Laws of England* (Legal Classics Library, 1765) Book 2.

² James Charles Smith, ‘Some Preliminary Thoughts on the Law of Neighbours’ (2011) 39 *Georgia Journal of International and Comparative Law* 757, 762.

1.1.3 Ultimately, the owners of the property, with the endorsement of Dr Goodwin, approached the Institute with a request to investigate the development of a suitable mechanism to resolve neighbourhood disputes over problem trees and hedges. In proposing this reference Dr Goodwin asked that the Institute examine the dispute resolution mechanisms available to neighbours who have issues with high hedges and in particular to consider the desirability of a legislative response to the resolution of neighbour disputes over problem trees and hedges.

1.1.4 This Report is concerned with the law as it relates to disputes between neighbours about trees and hedges that have grown on one property to the extent that they obstruct the access of sunlight to, and/or views from, a neighbouring property. The fundamental dilemma in tree or hedge disputes is the difficulty that an individual seeking a legal remedy faces in demonstrating the existence of a legal wrong. Generally, property law is premised on the principle that a landowner has the right to the full use and enjoyment of her or his land.³ However, in some cases the exercise of that right may impinge on other landowners' rights to the use and enjoyment of their land.⁴ This is where laws relating to trees or hedges as barriers to sunlight and a view find their genesis. It is rooted in the ideal of promoting orderly neighbour relationships, mindful of notions of mutual obligations premised on proximity, but also acknowledges the tensions which accompany attempts to balance competing interests. The issue has been the source of some academic interest⁵ and has been the subject of legislative intervention in New South Wales,⁶ Queensland⁷ the United Kingdom⁸ and New Zealand.⁹ In Victoria, the problem has been addressed by providing assistance through the Dispute Settlement Centre of Victoria.

1.1.5 Where the law has been reformed to address this issue, the ability to seek legal redress concerning trees or hedges that obstruct the access of sunlight and/or a view is derived from statute, which takes its general principles from an extension of the common law of private nuisance.¹⁰ Where such statutory change has been implemented, there is also usually a range of supporting policy documentation providing guidance to individuals in the application of the legislation. Educative material about the type of hedges that should be grown, so as to avoid potential disputes, is available and promoted through local government and other authorities. In other jurisdictions, in the absence of a statutory scheme, mechanisms for dispute resolution exist solely through the common law, local government planning law and the use of Neighbourhood Dispute Resolution Centres.

1.1.6 This Report considers both the common law and statutory responses to neighbour disputes involving trees or hedges that obstruct the access of sunlight and/or a view and recommends that a statutory scheme be adopted to address this issue in Tasmania.

³ Although this right has never been absolute.

⁴ For consideration of this issue see J R L Milton, 'The Law of Neighbours in South Africa' (1969) *Acta Juridica* 123, 128.

⁵ See, eg, Lynden Griggs and Roushi Low, 'Cutting down the Cypress Leylandii, Pittosporums and Cotoneasters on Your Neighbours' Land – The Resolution of Spite Hedges' (2012) 21(1) *Australian Property Law Journal* 1; Adrian J Bradbrook, 'Solar Access Law: 30 Years On' (2010) 27(5) *Environmental and Property Law Journal* 5; Bill Dixon, 'The Neighbourhood Disputes Resolution Act 2011 (Qld) and Disclosure Issues' (2012) 32 (2) *Queensland Lawyer* 80.

⁶ *Trees (Disputes Between Neighbours) Act 2006* (NSW).

⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld).

⁸ *Anti-social Behaviour Act 2003* (UK) c 38; *High Hedges (Scotland) Act 2013* (Scot) asp 6; *High Hedges Act (Northern Ireland) 2011*(NI) c 21.

⁹ *Property Law Act 2007* (NZ).

¹⁰ Generally an action in private nuisance arises where there has been a substantial and unreasonable interference in the use and enjoyment of land. See J S Gillespie, 'Private Nuisance as a Means of Protecting Views from Obstructions' (1989) 6 *Environmental and Planning Law Journal* 94.

1.2 Outline of the Report

1.2.1 Part 2 of this Report outlines the current law and discusses why, in most instances, relevant laws do not provide realistic or satisfactory solutions to this issue. In this regard, it briefly examines the relevance of the law of easements, restrictive covenants and nuisance to neighbour disputes about trees and hedges and outlines why these laws do not provide viable solutions to this issue. Statutory law, in particular the *Local Government Act 1993*, is also discussed.

1.2.2 Part 3 discusses the need for reform. It reviews the deficiencies of the current law and notes that these types of disputes can have significant negative effects not only for those directly involved but also for the wider community. The discussion in this Part briefly reviews the responses to the online survey that formed part of the Institute's public consultation as well as the questions in the Issues Paper that were directed toward gauging the extent of the issue in this state (a more detailed review of the online survey is provided in Appendix A). This review reveals that there is strong community support for changes to the law in this area. This Part also notes that in implementing any such reforms, care should be taken to balance the rights of property owners and ensure that the benefits provided by trees and hedges to both individuals and the community are appropriately recognised and safeguarded.

1.2.3 Part 4 canvasses the approaches that have been taken in other jurisdictions. Domestically, both NSW and Queensland have adopted statutory regimes to regulate this issue, while Victoria's emphasis on alternative forms of dispute resolution to neighbour disputes presents a somewhat different approach. This Part outlines the key developments and features of the law in these jurisdictions before turning to examine laws that have been adopted overseas to address this issue. In this regard, New Zealand (which has had laws pertaining to this issue for longer than most other jurisdictions) is discussed, as is the approach taken to this issue in the United Kingdom, where local authorities have been given primary responsibility for the resolution of hedge disputes. This Part also includes a brief discussion of the law that has developed on this topic in the United States.

1.2.4 Part 5 discusses options for reform. It reviews the responses to the questions posed in Issues Paper 19¹¹ (IP 19) and makes recommendations for reform. Specifically, this Part recommends that a statutory regime be implemented in Tasmania to address the issue of trees or hedges that obstruct the access of sunlight or views. The majority of this Part is directed toward making recommendations that provide the possible contours of a legislative scheme. It is informed not only by the submissions to IP 19, but also by the Institute's consultations with other relevant stakeholders and an examination of how these issues have been addressed in those jurisdictions that have enacted legislation concerning trees and hedges, most notably NSW and Queensland.

1.3 Scope

1.3.1 The project's scope was determined primarily with reference to the concerns raised in the initial approach to Dr Goodwin and by the substance of the Legislative Council motion passed in May 2012. Therefore, other neighbour disputes to which the existence of trees, high hedges or other vegetation might give rise, such as overhanging branches or damage caused by falling branches or the roots of trees, do not fall within the scope of this project. Similarly, while built structures may also create barriers to sunlight, existing local government laws regulate their maximum height and thus they are outside the scope of the reference. The project does not include costings for the various proposed reform options.

¹¹ Tasmania Law Reform Institute (TLRI), *Neighbour's Hedges as Barriers to Sunlight and a View*, Issues Paper No 19 (2014).

Part 2

The Current Law

2.1 Introduction

2.1.1 Issues Paper 19 discussed the adequacy of existing legal avenues available to a property owner (or occupier) who is aggrieved in the following circumstances:

- at the time of purchase there was a view from the property and/or sunlight accessing the property; and
- a hedge, tree or hedge-like structure has grown to a height where it now blocks that view and/or sunlight; and
- discussions with the neighbour have not resolved the problem; and
- he or she is seeking a legal remedy to restore access of sunlight and/or the view.

2.1.2 In Tasmania there are limited options available to property owners in dispute over trees or hedges on a neighbour's land that are obstructing the access of sunlight or views. In most cases these options are unlikely to provide a satisfactory resolution to the problem.

2.2 The current law and associated problems

Easements

2.2.1 An easement is 'a right enjoyed by a person with regard to the land of another person'.¹² In order to secure access to sunlight an easement might be created between two property owners providing for a free flow of sunlight to defined areas on the landowner's property. Such an easement would effectively grant the property owner the right to restrict the height of neighbouring vegetation in order to secure access to sunlight and prevent a neighbouring property owner from planting a high hedge. The easement is considered to attach to the land, is registered on the land title and binds future owners. However, an easement created in this way would, most likely, be dependent on the grant by one landowner to another. While two neighbours may agree to keep a hedge at a certain height during their tenure on the land, few people are likely to grant an interest in land that will bind their land in perpetuity.¹³ It should also be noted that the right to a view has been held to be too vague to form the subject matter of a grant of an easement by one property owner to another.¹⁴

¹² Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 3rd ed, 2004) 142.

¹³ A personal right or burden only binds the people who create it, however, as an easement attaches to the land, it binds both the parties who create it and future owners of the land: see Peter Butt, *Land Law* (Lawbook, 6th ed, 2010) 442. For a more detailed exposition of the law of easements and restrictive covenants see Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (LexisNexis Butterworths, 3rd ed, 2011).

¹⁴ *William Aldred's Case* (1610) 77 ER 816, 821. See also *Hunter v Canary Wharf Ltd* [1996] 1 All ER 482, 488–489 (where Pill LJ accepts that interference with television signals is analogous to the loss of a view which he notes is not actionable). See also Gillespie, above n 10, 96.

2.2.2 If a neighbour does not adhere to the terms of an easement, the matter may be actionable in nuisance.¹⁵

Subdivisions

2.2.3 Easements can be created as part of an approved subdivision and registered by the Recorder of Titles.¹⁶ If this is the case, the easement will appear on the property title and bind the current owners. However, it would be unusual for an easement of sunlight to be created in large-scale subdivisions by this method. Usually a large-scale subdivision is created for profit. The subdivider would only have created an easement if satisfied that the financial benefit in attaching easements to the blocks would outweigh the financial cost of creating the easement. It is unlikely that the time and cost taken to create the easements would make this a worthwhile exercise.¹⁷

Restrictive Covenants

2.2.4 A restrictive covenant is ‘a formal agreement ... limiting the actions of one or both parties to the agreement’.¹⁸ In this case, a property owner may agree not to do anything to his or her land that would impede the other person’s access to sunlight or to a view:¹⁹ ‘Since the law does not recognise easements such as rights to a view ... such rights may be acquired as restrictive covenants’.²⁰ However, while a restrictive covenant may protect access to sunlight or a view, as it is based on an agreement between two landowners in the first instance, it will be unlikely to yield a principled and satisfactory long-term solution for all landowners. As noted above, individual landowners may come to a mutual agreement during their individual tenure, but it is unlikely that many landowners will voluntarily agree to have an interest recorded or registered on their title that could limit what they can do on their land, with this potentially remaining on title in perpetuity. If such an arrangement is consented to by a landowner, it is more likely to be for a considerable price.²¹ If a neighbour does not adhere to the terms of a restrictive covenant, the possible remedies available include damages or an injunction.²²

2.2.5 Indeed, the genesis of the referral of this issue to the Tasmania Law Reform Institute (TLRI) was a complaint from landowners who live on a street where dwellings are subject to a restrictive covenant which provides that houses are not to exceed a height of 3.6 metres in order to protect the views that the residents of the street enjoy. However, there are no such restrictions on the height of vegetation and the owners’ outlook slowly disappeared as their neighbour’s hedge grew to a height greater than 3.6 metres.²³

¹⁵ *Finlayson v Campbell* (1997) 8 BPR 15, 703.

¹⁶ *Local Government (Building and Miscellaneous Provisions) Act 1993* (Tas) s 99.

¹⁷ It is more likely that an easement for sunlight might be retained in instances where the subdivision merely consists of the excise of one parcel of land from the parent property.

¹⁸ Butt (ed), above n 12, 378.

¹⁹ A restrictive covenant is like a contract between property owners. Normally, contracts only bind the parties to the contract. However, a restrictive covenant can be recorded on the title and become enforceable on future property owners provided that certain requirements of the rules of equity are met: see *Forestview Nominees v Perpetual Trustees WA* (1998) 193 CLR 154.

²⁰ LexisNexis, Halsbury’s Laws of Australia, 355 Real Property, ‘2 Covenants Affecting Land’ [355-12530] n 5.

²¹ Bradbrook, above n 5, 6.

²² Bradbrook and MacCallum, above n 13, Chapter 18.

²³ Tasmania, Parliamentary Debates, Legislative Council, (15 May 2012) 1–82 (Vanessa Goodwin MLC).

Nuisance

2.2.6 Nuisance is described as ‘a condition or activity which unduly interferes with the use or enjoyment of land.’²⁴ The law of private nuisance attempts to strike a balance between potentially competing interests: the right of people to do on their own land what they wish, and the corresponding right of neighbours to be free from interference in the use or enjoyment of their land.

2.2.7 Nuisance may provide a remedy to someone who is experiencing interference from a neighbour’s trees or other vegetation in the following circumstances: (1) a neighbour’s tree (or other vegetation) is interfering with the use and enjoyment of land; (2) a neighbour’s tree (or other vegetation) is causing physical damage to the land (including to buildings and other features on the land); or (3) a neighbour’s tree (or other vegetation) is encroaching on the land.²⁵ In order to bring an action in nuisance, a person must have title to sue in relation to the nuisance,²⁶ the interference must be to the detriment of the rights of the person entitled to sue, and the interference must be substantial and unreasonable.²⁷ If an action is successful, the normal remedy is damages or an injunction. However, in relation to trees and hedges that block the access of sunlight or views there are a number of reasons why it is unlikely that an action in nuisance would be suitable in the situations outlined above.

2.2.8 First, in terms of interference with the use and enjoyment of land as it pertains to a view, the courts do not recognise that ‘aesthetic values, like an unobstructed or pleasing view’²⁸ can be protected through the law of nuisance. This is because the common law does not yet acknowledge that the intrinsic (or economic) value of a view, is something that should be protected — ie a view is not, in law, a ‘beneficial use and enjoyment’ of land.²⁹ Further, the courts have been reluctant to recognise that an action in nuisance can be used to protect access to light.³⁰

2.2.9 Secondly, given the above, the utility of private nuisance as it pertains to problem trees or hedges is limited to cases where a neighbour’s trees cause physical damage (or have the potential to do so³¹), for example by tree roots that damage a neighbour’s drainage system or driveway, or to cases where there is encroachment, for example by overhanging tree branches. Generally, there must be actual physical damage to neighbouring land or buildings before a cause of action accrues in nuisance, but in some instances an injunction may be obtained to prevent damage from occurring.³² This means

²⁴ Richard Buckley, ‘Nuisance and *Rylands v Fletcher*’ in Michael Jones (ed), *Clerk & Lindsell on Torts* (Sweet & Maxwell, Thomson Reuters) 1395, 1396 [20-01].

²⁵ *Robson v Leischke* [2008] NSWLR 98, [54] (Preston CJ, referring to *Clerk & Lindsell on Torts*).

²⁶ ‘[O]nly a person with an interest in land or a right to occupy or exclusively possess land has title to sue in private nuisance’: see LexisNexis, *Halsbury’s Laws of Australia*, 415 Tort, ‘3 Nuisance’ [415-640] with reference to *Malone v Laskey* [1907] 2 KB 141; *Oldham v Lawson (No 1)* [1976] VR 654; *Hunter v Canary Wharf Ltd* [1997] AC 655. See also *Metropolitan Properties Ltd v Jones* [1939] 2 All ER 202, 205 (Goddard LJ); *Benning v Wong* (1969) 122 CLR 249, 320 (Windeyer J).

²⁷ For an overview of what constitutes substantial and unreasonable interference see P Frances McGlone and Amanda Stickley, *Australian Torts Law* (LexisNexis Butterworths, 2nd ed, 2009) 549-553.

²⁸ Paula Giliker, ‘Nuisance’ in Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook Co, 10th ed, 2011) 487, 498, citing (amongst others) *Newcastle City Council v Shortland Management Services* (2003) 57 NSWLR 173, [89]-[91] (Spigelman CJ).

²⁹ Gillespie, above n 10, 98 – citing *Bland v Mosely* (1610) 9 Co Rep 57b, 58a; and *William Aldred’s Case* 77 ER 816, 817.

³⁰ See generally the discussion by Bradbrook who states that, ‘in the absence of an easement of light, the right to light is not protected by the law of nuisance’: Adrian J Bradbrook, ‘Nuisance and the Right of Solar Access’ (1983) 15 *University of Western Australia Law Review* 148, 155. Citing the dicta in *Allen v Greenwood* 1980 Ch 119, he argues that it ‘must be considered highly doubtful whether the easement of light is sufficiently broad to include the right of solar access for solar energy purposes’ (at 158) and argues that access to sunlight for the purpose of solar collectors should be considered separate from the right to light.

³¹ For a comprehensive overview of the law of nuisance (in particular as it pertains to trees) see *Robson v Leischke* [2008] NSWLR 98, [42]-[92].

³² A nuisance is not complete until there is damage – before that point there is only the potentiality of the nuisance: *Robson v Leischke* [2008] NSWLR 98, [67] citing *Sedleigh-Denfield v O’Callaghan* [1940] AC 880, 896, 919-920. Note

that a person who is concerned about interference from a neighbour's tree or hedge will most likely have to wait until damage has occurred in order to obtain a remedy; this is unlikely to be satisfactory. And of course this has no bearing on cases where complaints stem from trees or hedges that block sunlight or views.

2.2.10 Finally, the costs, in terms of both time and money, of bringing a civil action in nuisance are prohibitive and it is therefore doubtful that this would be viable option for many people.³³

Abatement

2.2.11 Instead of taking the matter to court, a property owner whose rights have been infringed may seek to rely on the self-help remedy of abatement.³⁴ This allows the affected property owner to enter the property on which the infringement is occurring and remedy the situation.³⁵ The courts have held that abatement is a remedy that the law does not favour³⁶ and that abatement will only be justified when it is absolutely necessary.³⁷ It is unlikely that the reduction or removal of vegetation in order to secure sunlight or a view would satisfy the test of absolute necessity.

Statutory remedies

2.2.12 In limited circumstances a statutory remedy may facilitate removal of the obstruction created by a tree or hedge. There are a number of statutes that in some way touch on problems created by hedges or other vegetation. Generally, they enable responsible authorities to deal with hedges which constitute a nuisance,³⁸ a fire hazard,³⁹ or which pose a danger to road users.⁴⁰ A property owner aggrieved by a neighbour's hedge which is blocking either sunlight or a view has limited recourse under these Acts. For instance, pt 12, div 6 of the *Local Government Act 1993* (Tas) empowers councils to issue abatement notices on property owners if satisfied that a nuisance, as defined under the Act, exists. The definition of nuisance is currently limited to five categories: something that causes harm to the health, safety and welfare of the public; a risk to public health; excessive levels of noise or pollution; a fire risk; and unsightly articles or rubbish. If a hedge creates a nuisance under the *Local Government Act 1993*, an aggrieved property owner can approach the relevant council to remedy the situation. A council officer inspects the hedge and if it constitutes a nuisance⁴¹ serves an abatement notice on the property owner requiring her or him to remedy the situation. Appeal rights exist to a magistrate against the issue of the abatement notice and against any action taken by the General Manager to abate the nuisance in the event of the property owner's non-compliance. As the focus of these provisions is on the protection of public health and safety, any restoration of a view or access of sunlight under these statutes would be incidental to what was otherwise sought to be achieved.

however, that an injunction can be obtained to prevent nuisance (by encroachment or otherwise). This requires 'proof that the apprehended damage, first, is imminent or likely to occur in the near future and, secondly, [will be] very substantial or almost irreparable': *Robson v Leischke* [2008] NSWLR 98, [58], [67].

³³ New South Wales Law Reform Commission (NSWLRC), *Neighbour and Neighbour Relations*, Discussion Paper No 22 (1991) 17.

³⁴ Bradbrook and MacCallum, above n 13, ch 18. See also, *Tapling v Jones* (1865) 11 HLC 290, 311 (Lord Cramworth).

³⁵ Bradbrook and MacCallum, above n 13, [18.1]; In the case of a hedge this would amount to removing the portion of the tree that is blocking the passage of sunlight.

³⁶ *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226, 244.

³⁷ *Roberts v Rose* (1865) LR 1 Exch 82, 89.

³⁸ *Local Government Act 1993* (Tas) pt 12 div 6.

³⁹ *Fire Service Act 1979* (Tas) s 49.

⁴⁰ *Local Government Highways Act 1992* (Tas) s 39; *Roads and Jetties Act 1935* (Tas) s 42, 49; *Traffic Act 1925* (Tas) s 60.

⁴¹ As defined by the *Local Government Act 1993* (Tas) pt 12, div 6.

Planning law

2.2.13 Each Tasmanian local council has one or more planning schemes that guide land use, planning and development in its local government area. In any development application to erect buildings on land, councils require information on a range of factors and in some instances this may include landscaping.⁴² In order to minimise impacts on amenity and solar access among other things, there are restrictions limiting the height of dwellings and fences erected on land as well as limits on the minimum distance of buildings from property boundaries. However, generally there are no restrictions limiting the height of trees or hedges planted on property boundaries.

Alternative dispute resolution

2.2.14 Neighbours can attempt to mediate an issue instead of using formal court processes. Mediation may occur informally, talking to a neighbour or sending letters to identify the issues and seek an agreeable remedy, or by using formal mediation services which involve experts assisting both parties to reach agreement. These types of processes are collectively referred to as alternative dispute resolution (ADR).⁴³ Compared to resorting to litigation, the benefits of using ADR to resolve this, and similar types of neighbourhood disputes are said to include the reduced cost, the relative speed in resolving an issue, the ability to craft innovative solutions and that parties are empowered when they are able to control the process and determine their own mutually agreeable outcome.⁴⁴ However, there are some authors who identify concerns about the ADR process suggesting that it can undermine the role of publicly appointed adjudicators to apply the law consistently and objectively.⁴⁵

2.2.15 While ADR processes may provide a resolution and are widely accessible in some mainland jurisdictions, they are less accessible in Tasmania. In NSW, Community Justice Centres provide free mediation to help people in disputes reach an agreement (see below at 5.3.7).⁴⁶ And In Queensland and Victoria similar services are provided by Dispute Resolution Centres (Qld) and the Dispute Settlement Centre of Victoria (DSCV) (see below at 4.4 and 5.3).⁴⁷ All three jurisdictions provide free mediation services which are government funded and therefore accessible to most neighbours to resolve disputes.⁴⁸ There is no free government funded ADR service in Tasmania and therefore neighbours who seek to resolve their dispute through the assistance of a trained mediator must pay for private mediation services.

⁴² For instance Clarence City council requires a landscaping plan showing the landscaping treatment of any common property or communal areas for applications relating to multiple dwellings or community living: Clarence City Council, *Application for Development/Use or Subdivision — Checklist* <<http://www.ccc.tas.gov.au/webdata/resources/files/develop.pdf>>.

⁴³ Alternative dispute resolution is defined by the National Alternative Dispute Resolution Council (NADRAC) as ‘an umbrella term for processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them’: NADRAC, *What is ADR?* <http://www.nadrac.gov.au/what_is_adr/Pages/default.aspx>; Similarly, Sourdin defines alternative (or ‘appropriate’) dispute resolution to mean dispute resolution processes that ‘do not involve traditional (more adversarial) trial or hearing processes’: Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, 4th ed, 2012) [1.10].

⁴⁴ See Michael King et al, *Non-adversarial Justice* (Federation Press, 2009) 91–4.

⁴⁵ See eg, Owen M Fiss, ‘Against Settlement’ (1983-1984) 93 *Yale Law Journal* 1073, 1085.

⁴⁶ NSW Government, Attorney General and Justice, *Community Justice Centres* (22 February 2013) <http://www.cjc.nsw.gov.au/cjc/com_justice_index.html>. The service provides trained facilitators who determine if mediation is suitable, and if so, arrange mediation between the parties. Approximately 80 per cent of mediations are reported as resolving the dispute.

⁴⁷ Queensland Government, *Neighbourhood Mediation* (31 October 2013) <<http://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/neighbourhood-mediation/>>; Department of Justice (Vic), *Dispute Settlement Centre of Victoria* <<http://www.disputes.vic.gov.au/services>>.

⁴⁸ The main barrier to accessibility may be geographical location, however a degree of assistance by suggesting mediation strategies and techniques can be provided over the phone.

2.3 Conclusion

2.3.1 From the discussion above it is evident that a landowner will usually only have access to a remedy when an easement or a restrictive covenant already exists and is of such a type that access to sunlight and/or a view is protected. This is unlikely to be the case. Therefore an owner who is aggrieved will probably have no remedy unless the adjoining property owner is willing to negotiate a solution to maintain the tree or hedge to an agreed level.

Part 3

The Need for Reform

3.1 Introduction

3.1.1 Trees and hedges on private property can be a source of substantial conflict between neighbours. Generally, neighbours are able to deal with issues or disputes that arise in a reasonable and amicable manner.⁴⁹ However, in some instances despite good intentions such disputes may be unresolvable and in the absence of a satisfactory solution, anger and frustration between neighbours may become entrenched.

3.1.2 The harm for those that find themselves in a dispute with a neighbour over trees or hedges may or may not be amenable to quantification. For example, while it is possible to estimate the loss in value to a property that has had a desirable view obscured by the growth of a neighbour's trees⁵⁰ or, when shading occurs, to calculate the amount of increased energy required to heat a house, other factors, such as stress, anxiety or depression which may result from such disputes cannot so easily be measured.⁵¹ Moreover, the potential negative consequences of these types of disputes are not strictly limited to those directly involved. It is possible for unresolved tree or hedge disputes to have consequences for the wider community through their potential to create civic discord and lead to instances where laws are ignored or purposely broken.⁵²

3.1.3 The current law does not provide viable solutions for those that find themselves in a dispute with a neighbour about trees or hedges that obstruct the access of sunlight or views. As the New South Wales Law Reform Commission (NSWLRC) noted, 'the inadequacy of the common law and the legal process leaves a legal vacuum for neighbours in dispute about trees.'⁵³

Inadequacy of the current law

3.1.4 As noted in the previous Part, currently in Tasmania there is a lack of appropriate and cost effective solutions for landowners who find themselves in a dispute with a neighbour over trees or hedges. While there are several options at common law which may be pursued, these are unlikely to provide a satisfactory outcome. In terms of the access of sunlight — something which is of increasing importance as more people become interested in realising the benefits of solar energy — a

⁴⁹ Department of Justice and Attorney-General (Qld), *Resolving Neighbourhood Disputes: Review of Neighbourly Relations Discussion Paper* (2010) 1.

⁵⁰ In this regard, Gillespie notes that, '[i]n contrast to the pleasure conveyed by a view, the economic value that may be so derived is susceptible to quantification through empirical analysis. The loss sustained as the result of an obstruction of a view may often be directly reflected in a reduction in the market value of the land': Gillespie, above n 10, 103.

⁵¹ A government consultation in the UK revealed that common complaints about high hedges included that they could be associated with 'poor mental and physical health' through the reduction of light and the blocking of views. See House of Commons, UK, *High Hedges Bill* (Research Paper 01/20, 7 March 2001) 8.

⁵² For example, in the UK it was pointed out that, '[t]here is some evidence that, if there is no resolution in sight, these disputes could escalate. People could be tempted to cut back the offending hedge beyond the boundary line, leading to civil court actions for damages by the hedge owner. ... There have also been a few instances of violence.' See Office of the Deputy Prime Minister (UK), *Regulatory Impact Assessment: High Hedges – Implementing Part 8 of the Anti-social Behaviour Act 2003* (March 2005) [10].

⁵³ NSWLRC, *Neighbour and Neighbour Relations*, Report No 88 (1998) 22. The NSWLRC went on to argue that tree disputes, despite being private in nature, can nevertheless be a drain on public resources such as on 'local councils, chamber magistrates, members of Parliament, legal aid, and the police': at 23.

neighbouring landowner can grant an easement or agree to a restrictive covenant that protects the access of light. However, these options rely upon the neighbour's goodwill, which may not always be forthcoming. Further, an easement cannot be granted to protect a view. The law of nuisance can, in some circumstances, provide a remedy for someone who has suffered damage due to a neighbour's tree or where a tree is encroaching upon his or her land. However, an action in nuisance where interference with access to sunlight is alleged would face several challenges in both a legal and practical sense including the time and expense involved in pursuing such an action. Additionally, an action in nuisance would not be available where interference with a view is alleged (see [2.2.6]–[2.2.10] above).

3.1.5 Recourse to statutory law is also unlikely to provide a solution. Nuisance as defined in the *Local Government Act 1993* (Tas) is not designed to cover situations where amenity, rather than health and safety, is at issue.⁵⁴ Nor do planning laws adequately address problematic vegetation in this situation. Under current planning regulations, in order to minimise impacts on amenity there are restrictions that pertain to the height of dwellings, the type of permissible fencing as well as limits on the minimum distance of buildings from property boundaries. However, there are no restrictions limiting the height of trees or hedges planted on a property despite the fact that vegetation can have similar impacts on amenity to those of buildings and fences.

3.1.6 These problems with the law as it pertains to trees and hedges are, of course, not limited to Tasmania. As is discussed below (see Part 4 below) other jurisdictions have addressed this issue by developing statutory schemes that provide a fast, simple and effective means for people to resolve disputes about trees or hedges on neighbouring properties. In Queensland, these reforms were motivated by the recognition that 'the application of the common law of nuisance to a neighbourhood dispute about trees did not provide a realistic solution for people living in closely settled communities'.⁵⁵ Similarly, in NSW it was noted that '[p]roblems caused by trees are common throughout the community but the formal resolution of these disputes (especially if there is resort to the courts) is often very costly and unsatisfactory'.⁵⁶

3.2 Extent of the issue in Tasmania

Submissions

3.2.1 In order to learn community views about this issue, the Institute provided several options for responding to the questions posed in IP 19.⁵⁷ These included:

- an online survey available through the TLRI website;
- an online submission template (also available on the TLRI website) that largely mirrored the questions in IP 19 and sought to guide respondents through the submission process; and
- a more detailed written response to IP 19 itself.

3.2.2 The Institute received a total of 194 responses⁵⁸ across all options. The majority (153) were answers to the online survey. Of the remaining 41 submissions, 21 were made using the submission

⁵⁴ Other than in situations where something that 'constitutes an unsightly article' is determined to be a nuisance. See *Local Government Act 1993* (Tas) s 199(e).

⁵⁵ Queensland Law Reform Commission (QLRC), *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Discussion Paper, WP No 72, 2015) 44.

⁵⁶ NSWLRC, above n 33, 17.

⁵⁷ The Institute advertised for submissions to the consultation in the *Mercury*, the *Advocate* and the *Examiner* in March and April 2014.

⁵⁸ Note that respondents may have provided answers to more than one type of the available response methods. In relation to the Online Survey and Submission Template, it is possible that respondents may have answered more than once.

template, 13 were more detailed responses to IP 19 and the seven remaining responses were provided through a mixture of telephone and less formal written communications. This is a significant number of responses to a law reform paper in this state. (In NSW, a 2009 review of the statutory scheme that governs tree disputes between neighbours in that state received a total of 231 submissions — this was considered to be an unusually high number of submissions).⁵⁹

Responses to the online survey

3.2.3 The online survey provided a quick and accessible way for interested parties to indicate whether, in their experience, hedges (or similar vegetation) that block access to sunlight and/or a view are a problem in Tasmania. The purpose of the survey was not to draw any firm conclusions about the issue of problem hedges — rather, it was to gauge the extent of, or if indeed there is any concern in the community about problem trees or hedges and to understand how those who indicated that they have had such a problem had managed the issue.⁶⁰ The following is a brief summary of the results of the online survey. For a more detailed analysis of the answers to the Survey questions see Appendix A.

3.2.4 The online survey comprised five questions:

1. Have you ever had a dispute with a neighbour about a hedge or similar vegetation that is blocking light or a view?
2. If you answered ‘yes’ to the previous question, were you able to resolve the dispute amicably between yourselves?
3. If you answered ‘no’ to the previous question, did you (or your neighbour) resort to other measures to resolve the dispute? If so please indicate what other measures were taken.
 - Informal third party involvement
 - Formal mediation
 - Sought legal advice
 - Instituted legal proceedings
 - Considered employing ‘self-help’ (eg by trimming the vegetation yourself)
 - Other (please provide details)
 - Did not resort to other measures
4. Whether or not you have personally been affected by a ‘problem hedge’, do you consider that a more formal process for resolving such disputes is needed? (You may include additional comments in the space provided).
5. What is your postcode?

3.2.5 A large majority (82 per cent) of the people who answered the survey indicated that they had had a dispute about a tree or hedge with a neighbour. Significantly, most of these people also indicated that they were unable to resolve the dispute amicably. Indeed, only seven per cent of those who had answered that they had had such a dispute also answered that they were able to resolve the

⁵⁹ Department of Justice and Attorney-General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 9–10.

⁶⁰ The Institute acknowledges that the type of survey used — a web-based questionnaire — does not, in this instance, allow for the extrapolation of the results to a wider population due to the ‘voluntary response bias’ (ie self-selection) of participants. See Jelke Bethlehem, ‘Selection Bias in Web Surveys’ (2010) 78(2) *International Statistical Review* 161.

dispute. Clearly, for those that have problems with a neighbour's tree or hedge, there is high probability that the problem will remain unresolved. The survey also asked those who had indicated that they had a problem with a neighbour's tree or hedge how they had attempted to deal with the issue. The most common response to this question was that they had considered employing self-help measures such as trimming the vegetation. The comments to this question revealed that for most people in this situation, approaching the neighbour in an attempt to resolve the issue was ineffective. The final survey question asked whether a more formal process for resolving these types of problems was warranted. Most (88 per cent) indicated that they thought that a more formal process for resolving these types of disputes should be introduced.

Responses to the submission template

3.2.6 The submission template proceeded on the assumption that those who chose to respond believed that problem trees or hedges were a significant issue in Tasmania. It listed a number of options for reform and asked respondents to nominate a preferred option and elaborate on features that their chosen model should possess. One of the options was to make no change and rely on existing law (this option is discussed further below at 5.2), however, all 21 respondents to the submission template thought that some change to the current law was warranted. While the responses may not necessarily be indicative of the true extent of the issue, they do nevertheless show that for those individuals who provided a submission, problem trees or hedges are of sufficient concern to warrant changes to the current law.

Responses to Issues Paper 19

3.2.7 Question 1 of IP 19 asked whether there was evidence that trees or hedges that blocked access to sunlight and/or a view were a significant issue in Tasmania. Eight submissions directly addressed this question. Amongst these, one anonymous submission argued that reform was not warranted; it questioned whether any change was needed in this area at all, and if so, whether it should be considered a priority.⁶¹ Clarence Council indicated that they did not have any data on the actual number of queries it received about this issue, but noted that, anecdotally, the Council would field approximately one call every three months that pertained to problem hedges or similar type issues. Similarly, the Local Government Association of Tasmania (LGAT) submitted that a number of councils reported receiving approximately, '6-12 inquiries a year which could be broadly related [to trees or hedges that blocked the access of sunlight or views] but complaints have tended to focus on trees rather than hedges and relate more to perceived safety and/or droppage than sunlight, although there have been some cases where view has been the issue.'⁶² Nevertheless, LGAT went on to note that '[t]his does not mean it is not an issue and there is support in the sector for granting improved rights to address such issues.'

3.2.8 The remaining four submissions to IP 19 on this question reported that there was anecdotal evidence that this was an issue in their local areas.

Conclusion – the extent of the issue in Tasmania

3.2.9 A substantial majority of submissions to all three methods of response to this consultation agreed that some type of reform is necessary. Question 4 of the online survey asked respondents whether they thought that a 'more formal process for resolving "problem hedge"' disputes was needed regardless of whether they themselves had been affected by a problem hedge. As noted above, 87 per cent indicated that they thought that a more formal process is needed. This sentiment was echoed by

⁶¹ In a similar vein, another submission noted that whether or not a tree is considered to be a problem is a 'very subjective question': Submission of Eric Lockett (response to Question 1, IP 19).

⁶² Submission of LGAT (response to Question 1, IP 19).

the 21 responses the Institute received to Question 1 of the submission template (‘[w]hich model of reform do you prefer?’⁶³) with all respondents indicating that changes to the current law should be implemented. Similarly, Question 2 of IP 19 asked ‘whether there should be additional remedies for property owners who are aggrieved by another property owner’s high hedge that is blocking access to sunlight and/or a view or is the current law sufficient?’ Of the 10 responses received to this question, all indicated that additional remedies were required. No respondents to this question in IP 19 answered that the law regarding problem trees or hedges as it presently stands is adequate.

3.2.10 While, as outlined above, most responses to the consultation revealed that there is strong support for implementing changes to the law in order to provide an accessible means for those beset by problems caused by a neighbour’s trees or hedges, the Institute did receive three submissions that disagreed. These submissions generally argued that this issue is not of sufficient importance to justify intervention.⁶⁴ In particular, one anonymous submission argued forcefully that the number of people reporting these types of problems was not only quite small when compared to the overall population, but also that it was probable that the views reflected in the responses were heavily skewed in favour of those arguing in favour of law reform in this area as they were more likely to respond to the consultation. In this regard, the Institute considers that the number of those that may (or may not) be troubled by this issue should not necessarily determine whether intervention is justified. As argued above, the effect of the loss of sunlight or a view (or both) can have serious negative consequences for those so affected. To justify intervention on the basis of a purely quantitative analysis marginalises a section of the community for whom this issue has a significant adverse effect. The loss of sunlight in the home can be, apart from any economic detriment, associated with depression.⁶⁵ Not to intervene in this area has the potential to perpetuate significant discord between neighbours and the law would be failing in its civic responsibility if it did not provide a forum for appropriate dispute resolution.

3.2.11 Changes to the law in both NSW and Queensland were made in recognition that it was in the community’s best interest to provide a simple, affordable means of resolving one of the most ‘common sources of conflict’ amongst neighbours.⁶⁶ Given the lack accessible means to resolve such issues, similar considerations apply in Tasmania.

The importance of trees and hedges

3.2.12 It is important, however, that if changes to the current law are to be made, that the potentially conflicting rights of property owners be balanced and that any measures that are adopted to address this issue do not unduly affect the corresponding right of a neighbour to plant vegetation. Trees and hedges provide important benefits not only for individuals, but also to the wider community. They can provide privacy, shading and amenity to a property and may also have important environmental functions and a beneficial effect on the local ecology. The table below (reproduced from the 2013 review of high hedge provisions in the NSW *Trees (Disputes Between Neighbours) Act 2006*) summarises the benefits of trees and hedges for both individual landowners and the community in general:

⁶³ This question is discussed further below at 5.2.

⁶⁴ Anonymous Submission (Question 1, IP 19).

⁶⁵ See for example, Mary Jean Brown and David E Jacobs, ‘Residential Light and Risk for Depression and Falls: Results from the LARES Study of Eight European Cities’ (2011) 126(Suppl 1) *Public Health Report* 131. The authors cite studies that conclude that both sunlight and artificial light are effective in treating seasonal affective disorder. They also note that sunlight has been shown to be more effective in this regard.

⁶⁶ See QLRC, above n 55, [1.1]; NSWLRC, above n 53, 22–23.

Table 2: Summary of urban forest benefits⁶⁷

Environmental and ecological	Aesthetic and visual	Economic
<ul style="list-style-type: none"> • provides direct and indirect shade for cooling, increasing human comfort • reduces air temperatures in summer • acts as windbreaks to reduce cold winter winds • Decreases energy consumption for cooling • improves air quality (filtering toxic particles, sequestering carbon dioxide) • provides stormwater and catchment-related benefits • maintains urban ecology 	<ul style="list-style-type: none"> • softens the urban landscape • provides privacy • screens undesirable views • attracts birds and other wildlife 	<ul style="list-style-type: none"> • increases property value • energy consumption savings in summer

3.2.13 In NSW, the importance of these considerations was recognised through the adoption of a regime where the jurisdiction of the Court was ‘limited to the most problematic and serious high hedge disputes’. In the second reading speech of the Trees (Disputes Between Neighbours) Amendment Bill 2010, which extended the NSW Act to cover hedges that blocked the access of sunlight or views, it was noted that,

[the provisions in the Bill] recognise the numerous environmental and community benefits that trees provide. They recognise also that there are many legitimate reasons a person may wish to plant or preserve trees in the form of hedges. The court, therefore, will have to undertake a balancing exercise before it makes an order to remedy, restrain or prevent any obstruction of sunlight or views caused by a high hedge.⁶⁸

3.2.14 Similar considerations informed the adoption of the legislation in Queensland which contains a presumption against the removal or destruction of a living tree and also stipulates that the Tribunal must consider a tree’s contribution to the local ecosystem, the natural landscape and private and public amenity, amongst other things, before making an order in respect of a tree or hedge.⁶⁹

3.3 Conclusion

3.3.1 The submissions made to the Institute revealed that in some instances, for those who have problems with a neighbour’s trees or hedges, difficulties in reaching a satisfactory solution have led to much frustration, acrimony and anger between them and their neighbours. One submission noted that issues with shading caused by a neighbour’s trees have been ongoing for 25 years,⁷⁰ and other

⁶⁷ Dr Jane Tarran, (2009) ‘Improving Canberra’s sustainability: Why urban tree canopy and other vegetation matters’, presented at ACT Planning and Land Authority Bush Capital Workshop 7 April 2009, as summarised in Department of Justice and Attorney General (NSW), *Review of Part 2A of the Trees (Dispute Between Neighbours) Act 2006 (NSW) (High hedge provisions)* (2013) 7.

⁶⁸ New South Wales, *Parliamentary Debates*, Legislative Council, 18 May 2010, 22821 (Penny Sharpe).

⁶⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74, 73.

⁷⁰ Submission of Bill and Vicki Beresford.

submissions noted having similar issues over considerable timeframes.⁷¹ Photos that were attached to another submission demonstrated how the extensive ocean views that the property had enjoyed at the time of purchase were now completely obscured by the canopy of the trees planted by a neighbour along the boundary between the respective properties.⁷² Even more concerning was that a small number of anonymous submissions revealed that in some instances, respondents were contemplating (or had indeed already taken) questionable actions legally in order to resolve the issue unilaterally.

3.3.2 Currently, there is little incentive for a landowner whose trees or hedges are causing problems for a neighbour to negotiate with a neighbour as the law does not provide a realistic means to address the issue.⁷³ A stream-lined, affordable, and accessible regime could be beneficial not only to those who experience significant problems due to a neighbour's trees or hedges, but also for the wider community through the promotion of more harmonious neighbour relations.

3.3.3 Therefore, the Institute recommends that a scheme to address the problems caused by trees or hedges on a neighbouring property that obstruct the access of sunlight or views be implemented in Tasmania. Any such scheme should attempt to balance the rights of property owners and require that consideration be given to the wider importance of trees and hedges to the community.

3.3.4 The Institute stresses that the recommendations in this Report are in no way intended to suggest that a right to a view should be created (or recognised) in any scheme that may be adopted to address this issue. Indeed, any remedy that is provided should be discretionary and the discretion should not be exercised if it is inappropriate in the circumstances.⁷⁴

Recommendation 1

- That an accessible and inexpensive statutory scheme to address trees and hedges on neighbouring land that obstruct the access of sunlight or a view be implemented in Tasmania.
- That any such scheme include provisions that recognise the importance of trees and hedges to the community and balance the respective rights of property owners.

⁷¹ Eg submissions of Ainsleigh Villas Corp; Don Stirling; June Noble; Rob Byrne.

⁷² Submission of Ted and Edna Goggins.

⁷³ This was noted in NSWLRC, above n 53, 22–23.

⁷⁴ *Laing & Anor v Kokkinos & Anor (No 2)* [2013] QCATA 247, [32]. The QLRC stated (citing *Laing v Kokkinos*) that 'the Act does not create a right to a view.' See QLRC, above n 55, [3.104].

Part 4

The Law in Other Jurisdictions

4.1 Introduction

4.1.1 This Part of the Report considers reforms that have been implemented in other Australian as well as overseas jurisdictions. In these jurisdictions the common law relating to problem trees or hedges has been supplemented (and in some instances abrogated⁷⁵) by statute. Generally, these reforms allow aggrieved property owners to apply to a court, tribunal or local government authority for orders relating to trees or hedges so that the access of sunlight and/or a view can be restored. The features of these statutory schemes vary across jurisdictions.

4.1.2 The Australian models vest the decision making process with a court or tribunal.⁷⁶ An applicant must meet threshold requirements before the jurisdiction of the court or tribunal is enlivened. The court or tribunal has a number of orders available to it and an affected property owner has the right of appeal through superior courts.

4.1.3 In the international jurisdictions considered in this paper, tree and/or hedge disputes are handled by a variety of bodies including tribunals and courts (New Zealand and the United States) and local authorities and planning appeal authorities (the United Kingdom). Again, threshold requirements must be satisfied prior to application and the decision making bodies have a variety of orders at their disposal. Details of the various models are outlined below.

4.2 New South Wales

4.2.1 In 2010, NSW adopted a statutory based model of dispute resolution for problem hedges causing severe obstruction to sunlight or to a view via amendments to the *Trees (Disputes Between Neighbours) Act 2006*.⁷⁷ Key features of the model include:

- a court based model of resolution with statutory requirements about the nature of vegetation and the height of vegetation as a threshold to making an application to the court for resolution;
- property owners are required to have taken reasonable efforts to resolve their dispute prior to the court application;
- the Act only covers severe obstruction to sunlight to the windows of a dwelling or a severe obstruction to a view from a dwelling situated on the applicant's land; and

⁷⁵ *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 5 states that no action in nuisance as a result damage or of the obstruction of sunlight or a view may be brought in respect of trees to which the Act applies.

⁷⁶ In both NSW and Queensland the legislation incorporates broader issues than those solely related to obstruction to sunlight and views. In NSW the *Trees (Disputes Between Neighbours) Act 2006* also deals with trees that cause damage to property or injury to a person. In Queensland the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* also deals with boundary fences, boundary fence contributions and trees (including overhanging branches or where the tree is or is likely to cause serious injury to a person, serious damage to the land or substantial unreasonable interference with the neighbour's use and enjoyment of the land).

⁷⁷ *Trees (Disputes Between Neighbours) Act 2006* (NSW), as amended by *Trees (Disputes Between Neighbours) Amendment Act 2010* (NSW).

- the court must be satisfied that the severity and nature of the obstruction is such that the applicant's interest in having the obstruction removed, remedied or restrained outweighs any other matters that suggest the undesirability of disturbing or interfering with the trees by making an order.

4.2.2 The jurisdiction to hear these matters is based on an extension to existing legislation dealing with matters under the common law of nuisance. The genesis of the dispute resolution mechanism is located some 20 years earlier in the NSWLRC review of neighbourhood disputes⁷⁸ and 2009 government review of the legislation.⁷⁹

The legislation

4.2.3 Part 2A of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) provides for resolution of disputes in the following circumstances:

- Where there are two or more trees⁸⁰ planted (in the ground or otherwise) so as to form a hedge and which rise to a height of at least 2.5m above existing ground level;⁸¹
- The trees must be located on adjoining land;⁸²
- Applicants must first make a reasonable effort to resolve their dispute amicably;⁸³
- Notice must be served on the adjoining owner;⁸⁴
- There must be a severe obstruction to sunlight to the window of a dwelling situated on the applicant's land⁸⁵ or a severe obstruction to the view from a dwelling situated on the applicant's land;⁸⁶ and
- The court must be satisfied that the severity and nature of the obstruction is such that the applicant's interest in having the obstruction removed, remedied or restrained outweighs any other matters that suggest the undesirability of disturbing or interfering with the trees by making an order.⁸⁷

4.2.4 In effect, this requires a threshold determination that the obstruction is severe prior to conducting a balancing test of the individual interests of property owners. The Act also specifies a number of matters the court is to consider before determining an application under this Part. The use of the word 'is' in this section suggests that there is a mandatory requirement for the court to turn its mind to each and every matter outlined in this section.⁸⁸

⁷⁸ NSWLRC, above n 53.

⁷⁹ Department of Justice and Attorney-General (NSW), above n 59.

⁸⁰ 'Tree includes any woody perennial plant, any plant resembling a tree in form and size': *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 3; '[B]amboo and any other plant that is a vine': *Trees (Disputes Between Neighbours) Regulation 2007* (NSW) reg 4.

⁸¹ *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14A.

⁸² Ibid s 14B.

⁸³ Ibid s 14E(1)(a).

⁸⁴ Ibid s 14C, 14E(1)(b).

⁸⁵ Ibid s 14E(2)(a)(i).

⁸⁶ Ibid s 14E (2)(a)(ii).

⁸⁷ Ibid s 14E (2)(b).

⁸⁸ Ibid s 14F.

14F Matters to be considered by the Court

- (a) the location of the trees concerned in relation to the boundary of the land on which the trees are situated and the dwelling the subject of the application,
- (b) whether the trees existed prior to the dwelling the subject of the application (or the window or part of the dwelling concerned where the dwelling has been altered or added to),
- (c) whether the trees grew to a height of 2.5 metres or more during the period that the applicant has owned (or occupied) the relevant land,
- (d) whether interference with the trees would, in the absence of section 6(3), require any consent or other authorisation under the *Environmental Planning and Assessment Act 1979* or the *Heritage Act 1977* and, if so, whether any such consent or authorisation has been obtained,
- (e) any other relevant development consent requirements or conditions relating to the applicant's land or the land on which the trees are situated,
- (f) whether the trees have any historical, cultural, social or scientific value,
- (g) any contribution of the trees to the local ecosystem and biodiversity,
- (h) any contribution of the trees to the natural landscape and scenic value of the land on which they are situated or the locality concerned,
- (i) the intrinsic value of the trees to public amenity,
- (j) any impact of the trees on soil stability, the water table or other natural features of the land or locality concerned,
- (k) the impact any pruning (including the maintenance of the trees at a certain height, width or shape) would have on the trees,
- (l) any contribution of the trees to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land on which they are situated,
- (m) anything, other than the trees, that has contributed, or is contributing, to the obstruction,
- (n) any steps taken by the applicant or the owner of the land on which the trees are situated to prevent or rectify the obstruction,
- (o) the amount, and number of hours per day, of any sunlight that is lost as a result of the obstruction throughout the year and the time of the year during which the sunlight is lost,
- (p) whether the trees lose their leaves during certain times of the year and the portion of the year that the trees have less or no leaves,
- (q) the nature and extent of any view affected by the obstruction and the nature and extent of any remaining view,
- (r) the part of the dwelling the subject of the application from which a view is obstructed or to which sunlight is obstructed,
- (s) such other matters as the Court considers relevant in the circumstances of the case.

4.2.5 The court has a broad jurisdiction to make ‘such orders as it thinks fit to remedy, restrain or prevent the severe obstruction’.⁸⁹ Non-compliance with an order attracts a maximum penalty of 1000 penalty units.⁹⁰ If the tree owner sells her or his land and an order of the court remains on foot, the immediate successor in title is bound as if the order had been made in the successor’s name.⁹¹ This only applies where the applicant for the order has provided the immediate successor with a copy of the order.⁹² There is no time limit for such notification specified in the legislation.

Application of the Act

4.2.6 The NSW Land and Environment Court (LEC) gained jurisdiction to hear and determine Part 2A matters on 2 August 2010. IP 19 noted that since that time, there had been 154 applications of which 141 have been completed.⁹³

4.2.7 The NSW Attorney-General’s Department advises:

Most applications are from residents within the greater Sydney region. Applications are usually finalised well within the Court’s time standard of six months — with a median completion time of 105 days. To date 18% of all hedge applications have been discontinued pre-hearing. More than half of all hedge applications (54%) are dismissed/refused by the Court as the applicants’ cases fail to meet the jurisdictional tests under Part 2A of the *Trees Act*. For instance, the hedge may not meet the legal definition of a hedge or the obstruction of sunlight/views is not ‘severe’. Occasionally (6% of all cases) the respondent has trimmed or removed the hedge prior to the hearing. All hearings are conducted on-site by a Commissioner, who is usually a qualified arborist. The majority of applications involve obstruction of sunlight (44%) only, while 29% involved obstruction of views only. In 27% of all applications the applicant alleged severe obstruction of both views and sunlight.⁹⁴

4.2.8 More detailed information on the nature of applications is available for the year 2013. In that year 39 per cent of finalised applications concerned a hedge severely obstructing sunlight or views and 61 per cent represented a tree causing damage to property or person.⁹⁵ In cases concerning high hedges, the parties represented themselves 75 per cent of the time. In total these applications represented approximately 12 per cent of the Court’s finalised applications in 2013.⁹⁶ Thirty two per cent of tree disputes were finalised by alternative dispute resolution processes and negotiated settlement, without the need for a court hearing.⁹⁷

4.2.9 In applying the Act, the LEC has had to determine a number of issues which include:⁹⁸

⁸⁹ Ibid s 14D.

⁹⁰ Ibid s 15. A penalty unit is currently \$110: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

⁹¹ *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 16(1A).

⁹² Ibid s 16(2).

⁹³ Email from V Ferguson, Research Officer, Attorney-General’s Department NSW Government to P Shirley, 3 October 2013.

⁹⁴ Ibid.

⁹⁵ NSW Land and Environment Court, *Class 2: Tree Disputes and Local Government Appeals, Fast Facts* (24 October 2015) <http://www.lec.lawlink.nsw.gov.au/lec/types_of_disputes/class_2.html>.

⁹⁶ Ibid.

⁹⁷ NSW Land and Environment Court, above n 95.

⁹⁸ A review of all cases on the Land and Environment Court website as at the beginning of October 2013 was undertaken to extract this information.

- whether trees are considered to be on adjoining land;⁹⁹
- whether two or more trees are planted to form a hedge;¹⁰⁰ and
- when an obstruction is considered to be severe.¹⁰¹

4.3 Queensland

4.3.1 In Queensland, the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld)¹⁰² provides avenues for neighbours to resolve disputes about dividing fences and trees. As in New South Wales, the Queensland model is a statutory based scheme which incorporates actions in common law nuisance and also includes jurisdiction to make orders where there is a severe obstruction to sunlight to a window of a dwelling on the neighbour's land or a severe obstruction to a view from a dwelling on the land.¹⁰³ The jurisdiction is somewhat broader than NSW as it extends to issues where trees and hedges create a substantial and unreasonable interference with sunlight to the roof of a dwelling.

4.3.2 The key features of the legislation¹⁰⁴ are:

- jurisdiction is based in the Queensland Civil and Administrative Tribunal (QCAT);
- the neighbours must have first taken all reasonable steps to resolve the issue under any other relevant law;
- the Act outlines obligations of tree keepers to minimise disputes in the first instance;
- the Act specifies numerous criteria QCAT must consider in making a decision; and
- specific requirements for obstruction of a view include that the view must have existed when the applicant took possession of the land.

History of the Act

4.3.3 The Act was the end result of a process of community consultation which commenced in 2007 and which considered two specific causes of neighbourhood disputes: dividing fences and dangerous or intrusive trees.¹⁰⁵ An online survey found that almost 80 per cent of respondents had had a dispute with their neighbour, almost 60 per cent had been in a dispute over a dividing fence and 56 per cent had been in a dispute over dangerous or intrusive trees.¹⁰⁶

4.3.4 The legislation defines the obligations and rights of neighbours in residential areas regarding contributions and maintenance to dividing fences and defined issues relating to trees. The intent is to

⁹⁹ *P Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128.

¹⁰⁰ *Johnson v Angus* [2012] NSWLEC 1207, [25]–[27] (Galwey AC).

¹⁰¹ *Wood v Berg* [2011] NSWLEC 1068, [18]–[20], where the court held that for an obstruction to a view to be severe, the majority of the view would have to be obscured from the living area demonstrated to be the most frequently used. In *Haindl v Daisch* [2011] NSWLEC 1145, [64] the court considered that severity involved quantitative (the degree of the obstruction) and qualitative aspects (the type of view being obstructed).

¹⁰² Previously the *Neighbourhood Disputes Resolution Act 2011* (Qld).

¹⁰³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 3(b)(i)–(ii).

¹⁰⁴ Currently, the Queensland Act is under review as required by s 97 of the Act. See QLRC, above n 55.

¹⁰⁵ Renee Gastaldon, *Dividing Fences and Dangerous or Intrusive Trees: The Draft Neighbourhood Disputes Resolution Bill 2010* (June 2011) Queensland Parliamentary Library e-Research Brief, 2 <<http://www.parliament.qld.gov.au/documents/explore/ResearchPublications/ResearchBriefs/2011/eRBR201109.PDF>>.

¹⁰⁶ Hon C Dick MP, Attorney-General and Minister for Industrial Relations, 'Neighbourhood Disputes over Trees and Fences to be Easier to Resolve' (Ministerial Media Statement, 12 May 2010) <<http://statements.qld.gov.au/Statement/Id/69663>>. The actual number of respondents was not included in the statement.

minimise disputes in the first instance, however the legislation contains an overarching provision in Part 5 granting QCAT jurisdiction to make an order when land is affected by a tree and the neighbour cannot resolve the issue by the dispute resolution mechanisms provided in Part 4 of the Act.

The legislation

4.3.5 The provisions cover any woody perennial plant, any plant resembling a tree in form or size (eg bamboo, banana plant, cactus, and palm), a vine or a tree prescribed under regulations.¹⁰⁷

4.3.6 The Act sets out rules to minimise disputes in the first instance.¹⁰⁸ The statutory obligations of ‘tree keepers’¹⁰⁹ are to: cut and remove overhanging branches, ensure the tree does not cause serious injury to a person, ensure the tree does not cause serious damage to a person’s land or property on a person’s land, or substantial, ongoing and unreasonable interference with a person’s use and enjoyment of land.¹¹⁰

4.3.7 Neighbours are encouraged to resolve the matter informally, but in the absence of a resolution the affected owner can exercise the common law right of abatement¹¹¹ or apply to QCAT for resolution.¹¹²

4.3.8 In effect a neighbour will have been required to take the following action prior to the matter being heard by the tribunal:¹¹³

- (a) the neighbour has made a reasonable effort to resolve the issue with the tree-keeper; and
- (b) the neighbour has taken all reasonable steps to resolve the issue under any relevant local law, local government scheme or local government administrative process.¹¹⁴

4.3.9 QCAT is provided with broad jurisdiction to hear and determine any matter in relation to a tree in which it is alleged that land is affected by the tree.¹¹⁵ However, the jurisdiction is in effect limited by the orders that QCAT is authorised to make.

Orders relating to obstruction to sunlight and a view

4.3.10 QCAT is authorised to make such orders as it considers appropriate in relation to a tree affecting a neighbour’s land to remedy, restrain or prevent substantial, ongoing and unreasonable

¹⁰⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 45.

¹⁰⁸ *Ibid* s 3.

¹⁰⁹ Just who is a tree-keeper for the purposes of the Act is set out in s 48.

¹¹⁰ *Ibid* s 52.

¹¹¹ Under the common law right of abatement a property owner can cut any branches or part of a hedge that encroaches onto his or her property provided that any part of the hedge that is removed is returned to the owner. Normal thresholds for a private nuisance apply meaning the interference would need to be unreasonable. See [2.2.11] above.

¹¹² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 60.

¹¹³ This is statutorily achieved by placing limitations on the Court’s ability to make an order unless satisfied of the matters outlined in s 65.

¹¹⁴ There is a third threshold requirement outlined in s 65(c) relating to the dispute resolution for overhanging branches but this has not been included as the discussion in this section is limited to obstruction to light and views.

¹¹⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*(Qld) s 61.

interference with the use and enjoyment of the neighbour's land¹¹⁶ providing the tree rises to at least 2.5m above the ground¹¹⁷ and the obstruction is,

- (i) [a] severe obstruction of sunlight to a window or roof of a dwelling on the neighbour's land;
or
- (ii) [a] severe obstruction of a view, from a dwelling on the neighbour's land, that existed when the neighbour took possession of the land.¹¹⁸

4.3.11 By virtue of the legislation, the land can also be affected by a tree if the interference is likely within the next 12 month period to cause such obstruction.¹¹⁹ The legislation is limited in its application to the severe obstruction of a view from a dwelling on the neighbour's land.¹²⁰

Matters the Tribunal is to consider in making an order

4.3.12 The Tribunal is statutorily required under s 73 to consider a number of general matters before making an order.¹²¹ These include:

- (a) the location of the tree in relation to the boundary of the land on which the tree is situated and any premises, fence or other structure affected by the location of the tree;
- (b) whether carrying out work on the tree would require any consent or other authorisation under another Act and, if so, whether the consent or authorisation has been obtained;
- (c) whether the tree has any historical, cultural, social or scientific value;
- (d) any contribution the tree makes to the local ecosystem and to biodiversity;
- (e) any contribution the tree makes to the natural landscape and the scenic value of the land or locality;
- (f) any contribution the tree makes to public amenity;
- (g) any contribution the tree makes to the amenity of the land on which it is situated, including its contribution relating to privacy, landscaping, garden design or protection from sun, wind, noise, odour or smoke;
- (h) any impact the tree has on soil stability, the water table or other natural features of the land or locality;
- (i) any risks associated with the tree in the event of a cyclone or other extreme weather event;
- (j) the likely impact on the tree of pruning it, including the impact on the tree of maintaining it at a particular height, width or shape;

¹¹⁶ Ibid s 66(2)(b).

¹¹⁷ Ibid s 66(3)(a).

¹¹⁸ Ibid s 66(3)(b)(i)–(ii).

¹¹⁹ Ibid s 46(a)(ii).

¹²⁰ Ibid s 66(3)(b)(ii).

¹²¹ Ibid s 73.

- (k) the type of tree, including whether the species of tree is a pest or weed (however described) or falls under a similar category under an Act or a local law.

Tribunal decisions

4.3.13 Obstruction to a view: The Queensland legislation in effect incorporates a ‘first in time’ requirement. The view that is now obstructed must have existed when the applicant took possession of the land.¹²² This, in effect, means that QCAT needs to receive information about the view at the time the applicant initially acquired possession to determine the extent of obstruction since that time.¹²³

4.3.14 Substantial, ongoing and unreasonable interference: The Queensland legislation is modelled in part on the NSW *Trees (Disputes Between Neighbours Act) 2006* and while not binding on QCAT, the Tribunal has considered the NSW Court’s decisions in determining both the definition of ‘view’ and when an obstruction is ‘severe’.¹²⁴

Expert evidence

4.3.15 In order to provide evidence about the matters under the Act, the parties will normally need to provide expert evidence about the trees, growth patterns, shading, views, and options for maintaining trees to an acceptable level and similar matters.

4.3.16 This could result in significant expense and a contest between experts providing opposing views. The Tribunal has mitigated this through Practice Direction No 7 of 2013, which specifies that instead of individuals appointing their own expert, the Tribunal will appoint a single expert tree assessor (a qualified arborist) to provide expert evidence in proceedings. The role of the assessor is to inspect the tree and the properties involved and provide a report to the court outlining possible solutions. The Tribunal has the power to apportion costs as it sees fit.¹²⁵

Supporting policy documents

4.3.17 The Act is supported by a range of policy documents to assist neighbours to resolve disputes amicably in the first instance. These include:

- Neighbourhood Mediation Kit: The kit provides information to neighbours about mediation, how to prepare for mediation and a mediation checklist.¹²⁶
- Dispute Resolution: Tips on how to manage conflict.¹²⁷

4.3.18 The Queensland government hosts a separate website providing a range of information outlining the rights and obligations of neighbours relating to fences, trees and buildings.¹²⁸

¹²² Ibid s 66 (3)(b)(ii).

¹²³ *Werndly v Orchard* [2012] QCAT 599, [43].

¹²⁴ Ibid [29]–[34]. See also *Laing & Anor v Kokkinos & Anor (No 2)* [2013] QCATA 247, [36].

¹²⁵ Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 – Arrangements for Applications for Orders to Resolve Other Issues About Trees*, 1 July 2013.

¹²⁶ Queensland Government, *Neighbourhood Mediation Kit* (November 2011) <<https://publications.qld.gov.au/dataset/neighbourhood-mediation-kit/resource/050c6991-1e22-4933-b185-c92f770eb78a>>.

¹²⁷ Department of Justice and Attorney General (Qld), *Tips on How to Manage Conflict* (April 2007) <<https://publications.qld.gov.au/dataset/tips-on-how-to-manage-conflict-fact-sheet-d10>>.

¹²⁸ Queensland Government, *Disputes about Fences, Trees and Buildings* (3 September 2013) <<http://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/>>.

4.4 Victoria

4.4.1 No specific legislation in Victoria governs disputes over high hedges.¹²⁹ Whilst there is some control of native vegetation under the Victorian Planning Provisions,¹³⁰ this appears to be directed toward ensuring the protection of native vegetation and placing restrictions upon its removal. Other planning provisions consider the location of buildings to maximise energy efficiency and to ensure there is the retention of daylight into existing habitable dwellings.¹³¹ Trees can also be protected under heritage listing.

4.4.2 When neighbours have disputes about hedges they can be referred to the DSCV. The Centre is part of the Victorian Department of Justice and provides free dispute resolution services to all Victorians,¹³² with 15 offices located in regional and metropolitan Victoria. A number of different levels of dispute resolution are available.

Dispute Assessment Officers

4.4.3 On contact with the Centre, a Dispute Assessment Officer (DAO) assists to narrow the issue in dispute and suggest options, strategies and negotiation techniques to resolve the dispute. The DAO might also refer the client to other services, such as a local council, a lawyer or the police, where the matter falls within those areas. The DAO, with the client's agreement, can write to the other party and ask if they would like the Centre to be involved. If that person agrees, the DAO provides assistance to resolve the matter by talking to each party separately over the phone. The Centre also has an online resource for parties in dispute, which offers techniques to help in reaching agreement.¹³³

Mediation

4.4.4 If no resolution can be achieved and both the matter and parties are suitable, the dispute may be referred for mediation. Mediations are facilitated by an accredited mediator and are usually held within two weeks of referral. The mediator assists parties to explore issues, develop options, consider alternatives and ultimately to reach an agreement which can be reduced to writing. Approximately 85 per cent of matters are resolved through mediation.¹³⁴ The Centre also provides a Magistrates Court Civil Program where the Court can refer disputed claims under \$40,000 to the Centre for mediation.¹³⁵

4.4.5 The Centre does not keep separate statistics relating to disputes involving obstructions to sunlight and/or to a view but it does capture statistics across broader categories. In relation to the total number of disputes involving trees, shrubs and creepers, the Centre recorded an annual average of 2908 disputes from 2008 to 2014.¹³⁶ Disputes involving trees, shrubs and creepers were the third most common type of dispute during this period (behind 'fence' and 'general behaviour' disputes

¹²⁹ Email from Shirani de Saram, Planning and Building Systems, Department of Transport, Planning and Local Infrastructure (Vic) to Pip Shirley, 13 August 2013.

¹³⁰ Minister for Planning (Vic), *Victorian Planning Provisions*, 20 December 2013, cls 52.16, 52.17.

¹³¹ *Ibid* cls 54, 55.

¹³² See DSCV (2015) <<http://www.disputes.vic.gov.au/>>.

¹³³ Department of Justice, *Dispute Settlement Centre of Victoria: Dispute Assessment and Advice* (2015) <<http://www.disputes.vic.gov.au/dispute-assessment-advice>>.

¹³⁴ Department of Justice, *Dispute Settlement Centre of Victoria: Mediation* (2015) <<http://www.disputes.vic.gov.au/mediation>>.

¹³⁵ Department of Justice, *Dispute Settlement Centre of Victoria: Court-based Programs* (2015) <<http://www.disputes.vic.gov.au/court-based-programs>>.

¹³⁶ The number of disputes recorded by the Centre between 2008 and 2013 involving trees shrubs and creepers are as follows: 2008/09 = 2363; 2009/10 = 2701; 2010/11 = 2981; 2011/12 = 3291; 2012/13 = 3163; 2013/14 = 2949. See Department of Justice, *Dispute Settlement Centre of Victoria: Frequently Asked Questions – Statistical FAQs – Top 10 dispute types.xls* <<http://www.disputes.vic.gov.au/frequently-asked-questions#statistical>>.

respectively). However, only a proportion of these may relate to problem trees or hedges, as separate statistics are not available.

4.5 International examples

New Zealand

4.5.1 Whilst the laws in New Zealand that apply to trees and hedges that obstruct the access of sunlight or views were not examined in the Issue Paper, they were discussed during the Institute's consultations with local government. A brief outline of those laws is included here for completeness.

Background and history

In New Zealand, provisions relating to trees on neighbouring properties have a comparatively long history — they were first introduced into the *Fencing Act 1908* (NZ) in 1955.¹³⁷ The modern versions of those provisions are now found in ss 332–338 of the *Property Law Act 2007* (NZ).

The legislation

The Act allows an owner or occupier of any land to apply to the District Court¹³⁸ for an order to remove or trim a tree in certain circumstances. The Act applies to *any* 'tree, shrub or plant (tree)' that is growing or standing on *any* land.¹³⁹ Accordingly, the provisions of the Act can apply to a single tree and applications are not limited to trees located on adjoining land.

The Court can make an order under the Act whether or not the 'obstruction, or interference that ... the tree is causing' constitutes a legal nuisance.¹⁴⁰ Under s 335, the Court can make any order it thinks fit in relation to the tree if the order is fair and reasonable and is necessary to prevent, or prevent the reoccurrence of:

(1)(b)(ii) — an undue¹⁴¹ *obstruction of a view* that would otherwise be enjoyed from the applicant's land, if that land may be used for residential purposes under rules in a relevant proposed or operative district plan, or from any building erected on that land and used for residential purposes; or ...

(1)(b)(iv) — an undue interference with the use or enjoyment of the applicant's land by reason of the fall of leaves, flowers, fruit, or branches, *or shade or interference with access to light*; [emphasis added].

These considerations are tempered by the requirement that a refusal to make an order must cause hardship to the applicant that outweighs the hardship that would be caused to the defendant if the

¹³⁷ See *Fencing Act 1955* (NZ) s 26A, inserted by the *Fencing Amendment Act (No 90 of 1955)*. The provisions allowed the Magistrates Court to make an order in respect of trees on neighbouring land if it was satisfied that the interference caused by the trees in question involved injury or annoyance to the applicant, and that the hardship that would be caused to the applicant if an order was not made was greater than that caused to the occupier of the land on which the tree was growing.

¹³⁸ Section 362 of the Act grants jurisdiction to the District Court to make orders in respect of tree applications.

¹³⁹ *Property Law Act 2007* (NZ) s 332. That the trees can be growing or standing on any land means that applications under the Act are not restricted to trees on neighbouring land.

¹⁴⁰ *Ibid* s 332(2).

¹⁴¹ According to the Court, the inclusion of the word 'undue' in s 335(1)(b)(i) requires consideration of not just whether the trees block a view, but also the right of the landowner on which the trees are situated to plant vegetation as she or he sees fit: *Yandle v Done* [2011] 1 NZLR 255, [36]–[38].

order is made.¹⁴² The court is required to have regard to all the relevant circumstances before making an order (this specifically includes Māori cultural values) and, if relevant, must also take into account whether the obstruction or interference was already in existence when the applicant became the owner or occupier of the land.¹⁴³

The requirements in s 335 are supplemented with a number of other matters that the court must address before making an order in relation to a tree. These are set out in s 366 and include, among other things:

- the public interest in maintaining an aesthetically pleasing environment;
- the value of a tree as a public amenity;
- any historical, cultural or scientific significance of the tree; and
- any effects of removal or trimming the tree on ground stability and run-off etc.

Section 336 also prohibits the court from making an order in relation to a tree that is subject to heritage protection.¹⁴⁴

In contrast to the legislation in other Australian jurisdictions, the Act specifies that the applicant must pay for the reasonable cost of any work necessary to give effect to the Court's order. However, the Court can apportion the costs of carrying out the work if it thinks that it would be fair to do so having regard to the conduct of the respondent.¹⁴⁵

Under s 338 the Court can order that work, such as trimming a tree, must be carried out as often as necessary or in intervals that are specified in the order. However, the person that is subject to the order can apply to the court to have the order varied if there is a change in circumstances. If the respondent does not carry out the work in the time specified in the order, the court can authorise the applicant to enter the respondent's land to carry out the work and recover the costs of doing so from the respondent.

England and Wales

4.5.2 The English and Welsh model for resolving issues of high hedges can be seen as a suite or toolkit of policy options.

4.5.3 The toolkit consists of:

- better planning and information about growing hedges to prevent problems occurring;
- individual responsibility for resolution where there is a problem;
- supporting policy documents produced by the UK government and relevant authorities;
- legislation — formalised dispute resolution mechanisms through legislation and regulations pursuant to the *Anti-social Behaviour Act 2003* (UK) c 38;
- appeal processes through planning bodies (as distinct from the Australian court or tribunal based models); and
- ombudsman oversight.

¹⁴² *Property Law Act 2007* (NZ) s 335(1)(c).

¹⁴³ *Property Law Act 2007* (NZ) s 335(2).

¹⁴⁴ *Ibid* s 336(2).

¹⁴⁵ *Ibid* s 337(2).

The legislation

4.5.4 The *Anti-social Behaviour Act 2003* (UK) c 38 which regulates disputes over high hedges came into force in England and Wales on 1 June 2005.¹⁴⁶ The Act provides the framework for resolving disputes between neighbouring property owners about high hedges. Specifically, jurisdiction for resolution arises in the following circumstances:

- the complainant is the owner or occupier of domestic property;¹⁴⁷
- the complainant's reasonable enjoyment of that property is being adversely affected by the height of a high hedge situated on land owned or occupied by another person;¹⁴⁸
- the complaint does not relate to the roots of a high hedge;¹⁴⁹
- the high hedge must be a barrier to light or access; and
- it must be formed wholly or predominantly by a line of two or more evergreens; and
- it rises to a height of more than two metres above ground level.¹⁵⁰

4.5.5 If these conditions are satisfied the dispute can be referred to the local authority provided the complainant has first taken all reasonable steps to resolve the matter.¹⁵¹

Individual responsibility for resolution

4.5.6 It is a requirement under Part 8 of the *Anti-social Behaviour Act 2003* (UK) c 38 that the parties to a dispute first attempt to resolve the problem themselves and exhaust the avenues of mediation and negotiation before lodging a complaint with their local council. Individuals are assisted in their efforts at dispute resolution by the publication *Over the Garden Hedge* which provides practical suggestions for settling differences without involving the local council.¹⁵²

4.5.7 The legislation is thus the final recourse for the resolution of complaints. It codifies the requirement of self-help and confirms the power of the relevant authority to dismiss a complaint if it considers 'that the complainant has not taken all reasonable steps to resolve the matters complained of without proceeding by way of such a complaint to the authority'.¹⁵³

Supporting policy documents

4.5.8 The Department of Communities and Local Government (UK) publishes a number of policy documents that provide guidance to complainants and local authorities on the operation of the Act.

¹⁴⁶ *Anti-social Behaviour Act 2003* (UK) c 38.

¹⁴⁷ *Ibid* s 65(1)(a).

¹⁴⁸ *Ibid* s 65(1)(b). However, provision is also made for a complaint to be made where the property is for the time being unoccupied and reasonable enjoyment of the domestic property by a prospective occupier would be affected: ss 65(2)–(3).

¹⁴⁹ *Ibid* s 65(4).

¹⁵⁰ *Ibid* s 66(1).

¹⁵¹ The local authority is empowered to charge a fee for matters referred to it under these provisions: *ibid* s 68(1) (b).

¹⁵² United Kingdom, Communities and Local Government, *Over the Garden Hedge* (May 2005) <<https://www.gov.uk/government/publications/over-the-garden-hedge>>.

¹⁵³ *Anti-social Behaviour Act 2003* (UK) c 38, s 68(2).

These documents contain both general guidance relating to hedge disputes and more specific policy guidance for local authorities.¹⁵⁴

Complaints procedure – remedial notice

4.5.9 The local authority is charged with determining whether the high hedge adversely affects the complainant’s reasonable enjoyment of her or his property. This is coined as a subjective test in relation to the individual complainant. If the authority determines that the complainant’s enjoyment is so affected, it is required to serve a remedial notice specifying the immediate action that is to be taken to remedy the situation and any further action to prevent a recurrence.¹⁵⁵

4.5.10 There is a 28-day period before the remedial notice comes into operation (‘the operative period’) at the conclusion of which a compliance period commences during which the action specified in the notice must be undertaken. This length of this period is specified in the notice.¹⁵⁶ The authority can waive or relax the requirements of a remedial notice at any time after it is issued and, if it does so, it is to serve notice on every complainant and every occupier and owner of neighbouring land.¹⁵⁷

The remedial notice runs with the land

4.5.11 The remedial notice runs with the land in question. That is, it is not only binding on the current owner or occupier but also on subsequent owners or occupiers so long as the hedge is in existence.¹⁵⁸ This may have particular import when the notice contains ongoing requirements relating to the maintenance of hedges to alleviate ongoing problems. It is therefore given statutory recognition as a ‘local land charge’. A local land charge is a restriction or prohibition on land which is binding on successive owners and occupiers. It is created by statute and operates under the provisions of the *Land Charges Act 1975* (UK).

Appeals against remedial notices

4.5.12 Appeal rights exist against the issue, failure to issue, withdrawal, waiver or relaxation of a remedial notice.¹⁵⁹ An appeal is made to an ‘appeal authority’ which for hedges situated in England is the Secretary of State and for hedges situated in Wales is the National Assembly for Wales. In practice, the Planning Inspectorate conducts appeals.¹⁶⁰ The appeal is to be lodged within the 28 days of the issue of a remedial notice or date of notification of a withdrawal, waiver or relaxation of a notice.¹⁶¹ The appeal authority can extend the time allowed to appeal.¹⁶²

¹⁵⁴ See Department for Communities and Local Government (UK), *Collection – High Hedges* (11 July 2008) <<https://www.gov.uk/government/collections/high-hedges>>.

¹⁵⁵ *Anti-social Behaviour Act 2003* (UK) c 38, ss 69(1)–(2).

¹⁵⁶ *Ibid* ss 69(5)–(6).

¹⁵⁷ *Ibid* s 70.

¹⁵⁸ *Ibid* s 69(8).

¹⁵⁹ *Ibid* s 71.

¹⁶⁰ *Ibid* s 71(7). Section 71 of *Anti-social Behaviour Act 2003* c 38 (UK) sets out that appeals are made to an ‘appeal authority’. In England this is the Secretary of State, who delegates this authority to the Planning Inspectorate. In Wales, the appeal authority is the National Assembly for Wales, which delegates this authority to the Planning Inspectorate. See, in relation to England, Planning Inspectorate UK, *Appeals under section 71 of the Anti-social Behaviour Act 2003 – A Guide for Appellants (High Hedges)* (March 2013) 3.

¹⁶¹ *Anti-social Behaviour Act 2003* (UK) c 38, s 73(2).

¹⁶² *Ibid* s 74(4)(b).

Failure to comply with a remedial notice

4.5.13 Failure to comply is an offence subject, on summary conviction, to a fine not exceeding level 3 on the standard scale of fines.¹⁶³ This currently amounts to a maximum penalty of £1,000.¹⁶⁴ Additionally, if the court considers the failure to comply with a remedial notice is ongoing it may order that person to take steps to comply with the order.¹⁶⁵ Should a property owner fail to comply with a remedial notice, the local authority is empowered to enter the land and take the required action. Any expenses incurred in doing so remain a charge on the land and are binding on successive owners and occupiers.¹⁶⁶

Issues with operation of the legislation

4.5.14 There are some indicators of early problems with the operation of the legislation. In July 2008, a publication of the Department for Communities and Local Government, *Matters Relating to High Hedges: Notes to Local Authorities*,¹⁶⁷ sought to clarify some issues with the implementation of the legislation. Some of the initial issues appear to have included uncertainty relating to what constitutes a hedge; the status of a tree preservation order in relation to remedial notices; how hedge height is calculated; whether the Act covers remedial notices to prevent future obstruction; and protective measures for nesting birds.

United States

4.5.15 Only a cursory consideration of the law in the USA is made for the purposes of this review. Griggs and Low suggest that the law can be summarised as follows:

[A] United States citizen is entitled to construct a building on her or his own land to obstruct or deprive the adjoining landowner of light, air, or a view. However, a landowner cannot maliciously erect a structure with the purpose of depriving the view of the neighbour, particularly where no useful purpose is served by the structure. Legislative intervention has also followed, reflecting this common law development, which sees a statutory prohibition against the erection or maintenance of spite fences if done so with malice and intent to injure or annoy an adjoining landowner. The courts have liberally interpreted provisions such as this, so that plants that would not be considered horticulturally as a hedge plant can still be under the prism of common law interpretation of the legislation. Today, in the United States, “the spite fence doctrine is a well-established nuisance law rule ... Modern courts generally hold that a spite fence is a nuisance, for which the offended neighbour can obtain injunctive relief and damages.”¹⁶⁸

4.5.16 An example of legislative intervention is provided by amendments to the *California Civil Code*, § 841.4:

841.4. Any fence or other structure in the nature of a fence unnecessarily exceeding 10 feet in height maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property is a private nuisance. Any owner or occupant of adjoining property injured

¹⁶³ Ibid s 75(1).

¹⁶⁴ *Criminal Justice Act 1982* (UK) s 37.

¹⁶⁵ *Anti-social Behaviour Act 2003* (UK) c 38, s 75(7).

¹⁶⁶ Ibid s 77(3). Where two or more persons are liable for the expense they are jointly and severally liable: at s 77(4).

¹⁶⁷ Department for Communities and Local Government publication, *Matters Relating to High Hedges: Notes to Local Authorities* (July 2008) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7736/highhedgesnotes.pdf>.

¹⁶⁸ Griggs and Low, above n 5, 3–4, quoting James Charles Smith, ‘Some Preliminary Thoughts on the Law of Neighbours’ (2012) 39 *Georgia Journal of International and Comparative Law* 757, 772.

either in his comfort or the enjoyment of his estate by such nuisance may enforce the remedies against its continuance prescribed in Title 3, Part 3, Division 4 of this code.

4.5.17 The statute is construed broadly and includes ‘a row of trees planted on ... the boundary line between adjoining parcels of land’ within the definition of ‘fence or other structure’.¹⁶⁹ However, it remains the case that the dominant purpose must be to annoy the owner or occupier of the adjoining property.

The remedies available for this type of private nuisance include civil action or abatement. The person injured by a private nuisance may abate it provided they don’t commit a breach of the peace.¹⁷⁰

¹⁶⁹ *Wilson v Handley*, 119 Cal Rptr 2d 263, 271 (Ct App, 2002).

¹⁷⁰ *California Civil Code*, § 3501–3503.

Part 5

Options for Reform

5.1 Introduction

5.1.1 IP 19 (and the submission template) presented a number of options for reform and invited responses to a series of questions about those options. The options were:

- Option 1: make no change and rely on the existing law;
- Option 2: adopt the Victorian model of dispute resolution;
- Option 3: develop a statutory scheme;
- Option 4: extend the abatement notice provisions under the *Local Government Act 1993* (Tas); and
- Option 5: an alternative or hybrid option.

5.1.2 The following discussion briefly sets out the issues associated with each option and provides recommendations about the desirability of implementing the discrete models in Tasmania. It incorporates arguments contained in the various submissions to IP 19, where pertinent, and other relevant considerations such as the experience in other jurisdictions.

5.2 Option 1: Make no change and rely on existing law

5.2.1 The issues associated with this option were addressed above in Parts 2 and 3. Question 1 of the submission template provided respondents with the option of suggesting that no change be made to the existing law and Question 2 of IP 19 asked whether additional remedies for property owners should be created or whether the current law was sufficient.

Submissions

5.2.2 Amongst those that provided an answer to this question in IP 19, most (7 of 10) agreed that additional remedies should be provided to landowners (or occupiers) who find themselves in a situation where a neighbour's hedge or tree is obstructing the access of sunlight or views. LGAT submitted that there should be additional remedies. However, it noted that the discussion amongst councils focused on sunlight rather than views. According to LGAT, this was because their 'experience of representations based on views in the planning system suggest this would be a highly fraught area and difficult to regulate.'¹⁷¹ Clarence Council noted that the 'common law of private nuisance is limited in relation to complaints about a right to a view or sunlight.'¹⁷² Nevertheless, the Council did not adopt a position on whether additional remedies should be provided.

5.2.3 One anonymous submission to IP 19, arguing that the current law is sufficient, noted that there are potentially an endless variety of subjects over which neighbours may find themselves in dispute and that it is unrealistic to try to resolve them all — the fact that a dispute may arise is not

¹⁷¹ Submission of LGAT (response to Question 2, IP 19).

¹⁷² Submission of Clarence Council (response to Question 2, IP 19).

sufficient to justify regulation. According to this submission the common law in this area has achieved a balance between the competing interests of landowners and compelling reasons (such as actual harm) should be required before this balance is altered.

The Institute's view

5.2.4 Responses to IP 19, the submission template and online survey revealed that there is concern in the community about trees and other vegetation that block access to sunlight and views (see [3.2.5]–[3.2.10] above). Further, many of the submissions confirmed that the amenity provided by sunlight and views (as well as that provided by trees) is valued highly and that existing legal avenues do not currently provide a realistic means for resolving disputes about trees and hedges. As a result, those that have a tree or hedge dispute with a neighbour are often left in an unsatisfactory situation. Left unresolved, neighbour disputes can have negative effects not only on those involved, but also on the wider community.¹⁷³ It is the Institute's view that continued reliance on existing law in relation to problem trees and hedges is undesirable.

Recommendation 2

That the existing law no longer be the exclusive source of the law in relation to disputes between neighbours about trees and/or hedges.

5.3 Option 2: The Victorian model of dispute resolution

5.3.1 Question 3 of IP 19 (and Question 2 of the online submission template) asked whether a model similar to the Victorian scheme of dispute resolution¹⁷⁴ (see 4.4 above) should be adopted in Tasmania to deal with the issue of problem trees and hedges and, if so, what sort of matters should be incorporated into such a model.

Submissions

5.3.2 The majority of responses to this question in IP 19 (four of seven) did not support adopting the Victorian model of dispute resolution. However, even those who were in favour of this model also thought that ADR processes should be complimented by some form of statute-based dispute process.

5.3.3 Both Clarence Council and LGAT did not support this model. Clarence Council argued that, as there are no free or government supported ADR services in Tasmania, a statutory based scheme would be more appropriate. LGAT was of the view that voluntary dispute resolution was inadequate, particularly as there are limited legal options available if the parties are unable to reach an agreement. LGAT also noted that it had, in partnership with the Environment Protection Authority Tasmania, implemented a mediation service for environmental disputes (the 'Environmental Dispute Mediation Project') but that this had been unsuccessful due to the 'unwillingness of parties to enter voluntary

¹⁷³ The explanatory notes to the introduction of the Neighbourhood Disputes Resolution Bill 2010 (Qld) note that the review of neighbourly relations in that state was conducted 'to find more efficient ways of assisting neighbours to resolve their disputes so that the friendly, tight-knit communities, which are one of Queensland's great strengths, might be supported by appropriate laws and dispute resolution processes.' See Queensland Government, 'Neighbourhood Disputes Resolution Bill 2010, Explanatory Notes' 1-2 <<https://www.legislation.qld.gov.au/Bills/53PDF/2010/NeighDisResB10Exp.pdf>>.

¹⁷⁴ For a definition of ADR see n 43 above. ADR includes (but is not limited to), 'negotiation, mediation, evaluation, case appraisal and arbitration': Sourdin, above n 43, [1.15].

mediation.’ LGAT argued that a ‘similar risk would underlie any voluntary dispute processes established’ to deal with problem trees or hedges.¹⁷⁵

5.3.4 There was limited support for the adoption of a model that involved ADR amongst those that responded using the submission template with three responses out of 21 selecting this option.¹⁷⁶

The Institute’s view

5.3.5 As outlined above, Victoria does not have specific legislation pertaining to neighbourhood disputes about trees and other vegetation (see 4.4). Rather, property owners who are experiencing problems with a neighbour’s trees or hedges can access free ADR services through the DSCV. If the parties are unable to resolve their dispute through ADR then the next step would be to lodge a claim, most likely based in nuisance, with the relevant court. The ADR services offered by the DSCV rely on voluntary participation¹⁷⁷ and decisions arrived at in mediation are not binding (unless the parties agree otherwise).

5.3.6 For disputes of this nature in Tasmania, there are currently no free stand-alone government supported ADR services.¹⁷⁸ As IP 19 noted,¹⁷⁹ there are a number of private mediation services in Tasmania that may be of assistance to those that have a dispute of this nature. Attendance is not compulsory however and relies on the willingness of the neighbour to participate. This can be problematic where there have been long-standing or particularly vexatious issues between neighbours or where there is simply an unwillingness to cooperate. Further, compliance with mediated agreements also relies on voluntary cooperation (unless otherwise agreed); in the event of non-compliance by one of the parties, the most likely recourse would be an action in nuisance — the problems associated with this are outlined above at [2.2.6]–[2.2.10].

5.3.7 In both NSW and Queensland the statutory schemes that have been implemented are supported by government funded ADR services. For example, in Queensland it is recommended that those with a tree dispute first attempt to resolve the dispute using the free mediation services provided through Community Dispute Resolution Centres prior to applying to QCAT for resolution of the dispute.¹⁸⁰ This recommendation is reinforced by a legislative requirement that a ‘reasonable effort’ be made by the parties to reach an agreement before QCAT’s jurisdiction can be enlivened.¹⁸¹ The situation is similar in NSW where Community Justice Centres provide free mediation services¹⁸²

¹⁷⁵ In relation to alternative dispute resolution, the Online Survey asked at Question 3 if those with a tree dispute with a neighbour had used mediation in an attempt to resolve the dispute. Only three responses (two per cent of responses to that question) indicated that mediation was used, with one of those responses relating that it had been unsuccessful.

¹⁷⁶ The question as posed in the online Submission Template did not invite opinions as to whether a scheme involving the use of ADR should be adopted in Tasmania. Rather, the Submission Template asked: ‘[w]hat types of matters might appropriately be dealt with under a dispute resolution model’. It then continued: ‘[w]hat key features should such a model possess? (You might consider questions relating to cost, accessibility, the administering body.’ There was no consensus amongst responses as to what such a model should contain.

¹⁷⁷ It should be noted that the DSCV handles mediations referred to it by the Magistrates Court in certain civil disputes and that these would not be on a voluntary basis as they are mandated by the Court.

¹⁷⁸ Note however that conciliation conferences can be required in certain circumstances, eg as an adjunct to minor civil claims in the Magistrates Court. See *Magistrates Court (Civil Division) Act 1992 s 39B* and *Magistrates Court (Civil Division) Rules 1998* (Tas) Part 4; or before tribunal hearings in RMPAT. See *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) s 16A.

¹⁷⁹ See TLRI, above n 11, [2.4.2].

¹⁸⁰ For an outline of the recommended steps to take in regard to a tree dispute in Queensland, see: <<https://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/step-by-step-guide-to-resolving-tree-and-fence-disputes/>>.

¹⁸¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2001* (Qld) s 65. Mediation is not mandatory, but can demonstrate that a ‘reasonable effort’ has been made.

¹⁸² See Department of Justice (NSW), Community Justice Centres (2015) <<http://www.cjc.justice.nsw.gov.au/>>.

which operate in addition to a statutory scheme that requires that applicants make a reasonable effort to reach an agreement with their neighbour before the Court can make an order.¹⁸³

5.3.8 The Institute is not persuaded that ADR should be used as a stand-alone alternative to other, more formal processes in the resolution of neighbour disputes about trees or hedges. This is due to potential difficulties with compelling a neighbour to participate in ADR processes — particularly where there is a level of animosity between neighbours that would make voluntary attendance or compliance unrealistic or undesirable — and the (potentially) non-binding nature of agreements reached through ADR, making the enforcement of agreements unworkable in some cases. Further, if ADR fails to resolve the dispute recourse would be to the common law, a situation that is unlikely to provide a satisfactory resolution to the dispute.

5.3.9 However, despite these potential difficulties, the Institute recognises that ADR is a valuable tool in resolving disputes and that it has generally been found to provide would-be litigants with beneficial outcomes, and, in many instances, ‘greater satisfaction’¹⁸⁴ than formal court proceedings. Moreover, ADR can be an effective cost and time saving measure for both participants and courts alike.¹⁸⁵ For these reasons it is often required in advance of, or in addition to, more formal court- or tribunal-based proceedings. Both the Supreme Court and the Magistrates Court may require civil litigants to undertake mediation or participate in conciliation conferences.¹⁸⁶ Similarly, before hearing an appeal the Resource Management and Planning Appeals Tribunal (RMPAT) may first require the parties to engage in mediation.¹⁸⁷

5.3.10 Therefore, the Institute is of the view that ADR should be recommended or required as an adjunct or prerequisite to more formal processes for the resolution of tree or hedge disputes. For example, undertaking some form of ADR could be required (or could be recommended as in Queensland and NSW) before more formal dispute processes may be accessed, or the relevant decision making body could require the parties to engage in ADR on a case by case basis once a dispute has formally commenced (this would be similar to the requirements for some civil matters in the Supreme Court and Magistrates Court and for the parties to an appeal in RMPAT).

Recommendation 3

- That a model similar to the Victorian model of dispute resolution for resolving neighbour disputes about trees and hedges not be implemented in Tasmania.
- That parties be required to engage in some form of ADR in relation to the dispute (in line with current court and tribunal practices) before a matter can progress to a hearing.

¹⁸³ *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14E(1)(a). See also *Robson v Leischke* [2008] NSWLEC 152, [191]-[196].

¹⁸⁴ Sourdin, above 43, 35.

¹⁸⁵ In relation to ADR and case management see eg, *ibid* 22. See also Nathan K DeDino, ‘When Fences Aren’t Enough: The Use of Alternative Dispute Resolution to Resolve Disputes Between Neighbors’ (2003) 18 *Ohio State Journal on Dispute Resolution Ohio State Journal on Dispute Resolution* 887, 891–92.

¹⁸⁶ See eg, *Alternative Dispute Resolution Act 2001* (Tas) s 5; *Supreme Court Rules 2000* (Tas) Part 20; *Magistrates Court (Civil Division) Rules 1998* (Tas) Part 4. The Magistrates Court provides information about the conduct of mediation and conciliation conferences on its website. See Magistrates Court of Tasmania, ‘Mediation and Conciliation Conferences’ (2014) <http://www.magistratescourt.tas.gov.au/divisions/civil/Mediation_and_Conciliation>.

¹⁸⁷ *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) s 16A; Resource Management and Planning Appeals Tribunal (RMPAT), *Practice Direction 5: Alternative Dispute Resolution* (11 March 2015) <www.rmpat.tas.gov.au/practice_directions>. RMPAT notes that it is committed to ADR, as it: ‘offers an opportunity for the early resolution of matters with significant cost savings to parties’: Resource Management and Planning Appeal Tribunal, *Annual Report 2013-2014* (2015) 5 <<http://www.rmpat.tas.gov.au/>>.

5.4 Option 3: Develop a statutory scheme

5.4.1 Question 4 of IP 19 (and Question 3 of the submission template) asked if a statutory scheme were to be adopted, which model would be preferable. The options were:

- (a) A model with the local council as the initial decision making authority with appeal rights to RMPAT;
- (b) A model with the local council as the initial decision making authority with appeal rights to the Administrative Appeals Division of the Magistrates Court;
- (c) A model where applications are made directly to the Court; and
- (d) A variant model.

5.4.2 IP 19 identified three types of statute-based schemes that have been implemented in other jurisdictions to deal with problem trees and hedges. The first, that which was adopted in the UK, gives local authorities jurisdiction to hear and resolve hedge disputes in accordance with the *Anti-social Behaviour Act 2003* (UK). In England, appeals are made to the Planning Inspectorate.¹⁸⁸ The second type is one where applications are made directly to a court. This type of scheme was adopted in NSW, where the Land and Environment Court hears disputes under the *Trees (Disputes Between Neighbours Act) 2006*. Appeals can be made to the Land and Environment Court or the Supreme Court in certain circumstances.¹⁸⁹ (Although not discussed in IP 19, applications made in relation to problem trees and hedges in New Zealand are also made to a court).¹⁹⁰ The third type of statute-based scheme is one where an application is made to a tribunal such as that which was implemented in Queensland, where applications are made to QCAT under the *Neighbourhood Dispute (Dividing Fences and Trees) Act 2011*. Appeals can be made to the Tribunal or a court in certain circumstances.¹⁹¹

Submissions

5.4.3 There were a total of 22 submissions to this question across both IP 19 and the submission template. The most popular response was (a) the local council as the initial decision making body with appeal rights to the RMPAT, with 11 respondents choosing this option. Six respondents selected (c) applications made directly to a court, including Clarence Council and LGAT, which stated that there was some support amongst councils for this model. Three respondents chose (b) and two respondents chose (d).

(a) Local council as the initial decision making authority with appeal rights to RMPAT

Submissions

5.4.4 LGAT, Clarence City Council and representatives of local councils in northern Tasmania were all strongly opposed to any model that involved local councils in any assessment or decision-making processes about tree or hedge disputes on private property.

5.4.5 LGAT submitted that there was no support amongst councils for this option and stressed that it was not council's role to adjudicate disputes between private landowners. LGAT was also concerned that the costs of providing services of this nature would not be adequately recovered by

¹⁸⁸ *Anti-social Behaviour Act 2003* (UK) c 38, s 71; see n 160 above.

¹⁸⁹ Sections 56, 56A and 57 of the *Land and Environment Court Act 1979* (NSW) provide that appeals can be made on questions of law in relation to tree disputes (ie class 2 proceedings under the statute).

¹⁹⁰ *Property Law Act 2007* (NZ) s 362(1)(e).

¹⁹¹ See s 26 and Part 8 of the *Queensland Civil and Administrative Tribunal Act 2009*.

councils, particularly as individual complaints were likely to be ‘spread thin and wide’ thereby requiring greater expenditure in the resolution of such disputes on behalf of councils. According to LGAT matters of this nature are potentially resource intensive and that ‘a centralised mechanism for resolution’ is more desirable in order to maximise economies of scale.¹⁹²

5.4.6 Clarence Council submitted that it was not council’s role to act as a ‘mediator or prosecutor’ in what is essentially a private matter. Noting the distinction between public and private nuisance,¹⁹³ Clarence Council argued that the relevant provisions of the *Local Government Act 1993* (Tas)¹⁹⁴ allow them to issue abatement notices only if something is in the nature of a public nuisance. The Council explained that the relevant provisions of the *Local Government Act 1993* (Tas) are primarily aimed at allowing council to intervene in situations where there is a serious and/or imminent threat to health and safety or the welfare of the public and, on the Council’s understanding, these provisions are not designed to protect individual landowners from their neighbours trees or hedges:

To act under the nuisance provisions, council needs to be responding to a concern for the health, safety and/or welfare of the public not an individual person. The provisions are not designed to provide protection for individual properties and/or landowners particularly where a private property is affected as a result of another private property. In such circumstances, there are no concerns for the health, safety and/or welfare of the public. Therefore, action under the *Local Government Act 1993* would not be considered and the complaining party would be advised to seek advice on action for private nuisance. Council’s only involvement in a complaint concerning a hedge is where the hedge constitutes a fire hazard.¹⁹⁵

5.4.7 Representatives from councils in northern Tasmania shared these concerns.¹⁹⁶ In a consultation with northern councils held by the TLRI, it was argued by the majority of representatives that councils were not the appropriate venue for disputes of this nature — ie disputes between private landowners. It was pointed out that, in-keeping with council’s role of acting in the interests of the community, local councils should only become involved in issues concerning trees when there is a public dimension to the problem, such as where a tree is encroaching upon a public space such as a park or footpath. Further, it was argued that councils lacked the resources to attend to disputes between private landowners and that council resources should be directed toward providing services to the public and not to the settlement of private disputes. It was stressed that a more appropriate role for local councils insofar as private disputes between neighbours about trees or hedges are concerned, would be to provide information and/or educative material to the public or to refer them to where such information could be obtained.

5.4.8 Nevertheless, as noted above, a model with council as the initial decision making body was the most popular choice amongst submissions to IP 19 and responses to the submission template. Some of the reasons given included that councils are less formal and intimidating;¹⁹⁷ that councils could include any such requirements in planning schemes (this would mean that compliance was a regulatory matter and would potentially lead to less ‘negative feelings amongst neighbours’ as the process would not be adversarial in nature),¹⁹⁸ and that clear guidelines administered by local councils could help minimise costs by obviating the need to have recourse to the courts.¹⁹⁹

¹⁹² Submission of LGAT (response to Question 4, IP 19).

¹⁹³ The common law tort of public nuisance relates to acts or omissions that ‘materially [affect] the reasonable comfort and convenience of the life of a class of the public’: *Wallace v Powell* [2000] NSWSC 406 (Hodgson CJ). See also McGlone and Stickley, above n 27, 557.

¹⁹⁴ See *Local Government Act 1993* (Tas) s 20, ss 199-203.

¹⁹⁵ Submission of Clarence Council (response to Question 4, IP 19).

¹⁹⁶ TLRI meeting with northern councils, Launceston Town Hall Committee Room, 10 April 2014.

¹⁹⁷ Submission of Lucy Palmer (response to Question 3, Submission Template).

¹⁹⁸ Submission of Ovie Taylor (response to Question 3, Submission Template).

¹⁹⁹ Anonymous submission (response to Question 3, Submission Template).

5.4.9 No submissions addressed appeal rights in any substantive way.

The Institute's view

5.4.10 The submissions made to the Institute as well as the consultations that were held with government representatives and local councils revealed that there was a divide between those who thought local councils should play a primary role in any statutory model that was adopted and those who did not. As noted, supporters of this model cited familiarity with local councils, potential cost savings and the advantages of a system where local council impartially applied relevant regulations as reasons for choosing this model. Additionally, given their role in maintaining trees on public lands, local councils have, or have access to, expertise in arboriculture and in some instances do make site visits to assess whether or not a tree should be lopped or removed.²⁰⁰ Local councils may also be able to access relevant information quickly such as significant tree registers and other planning related conditions or restrictions that may apply to the tree or hedge in question.

5.4.11 On the other hand there was strong opposition from local councils to any model that involved councils in any decision-making capacity. As noted, the primary concerns advanced were that it was not within councils' defined role to act as adjudicator in a private matter between two landowners and that 'it would be unfair for council to expend [public] money and resources on a matter that firstly only affects two individual parties.'²⁰¹ It was also noted that it would be inappropriate for councils to act as decision makers in this context given their role as regulators in other contexts. Any such scheme, it was argued, would be 'resource intensive' and council resources would be better spent on providing services to the public. Further, it was argued that a centralised system would be more cost effective.

5.4.12 While there are compelling reasons for involving councils as primary decision making authorities in disputes about trees and hedges, the Institute is not persuaded that the resolution of such disputes would best be served through a model where local councils act in this role. The Institute agrees with the argument that local councils are ill-suited to resolving these types of disputes. Councils in Tasmania have not had such a role and therefore have no experience in performing such a role. Additionally, they do not have the existing infrastructure to support such a role. To impose this role upon them would mark a significant departure from their existing responsibilities. While councils do have access to arborists and possess expertise in assessing whether a tree on private land should or should not be removed in accordance with local planning regulations or under the *Local Government Act*, this does not mean that councils possess the necessary expertise in mediating or adjudicating disputes between private landowners in the context of the of developing a coherent body of law in this area. One possible outcome of placing responsibility for tree disputes with local councils could be that a higher number of these disputes are appealed, ultimately creating inefficiencies and leading to increased costs for those involved.²⁰² The Institute is of the view that there are other more appropriate options available in Tasmania.

5.4.13 It was noted by some respondents to IP 19 that the resolution of these types of disputes would be handled best by incorporating regulations pertaining to trees and hedges into local planning schemes. This would give local councils primary responsibility for assessing compliance with relevant height and or view restrictions that would be incorporated into local planning schemes. This

²⁰⁰ Requirements regarding the removal of trees on private land are not uniform across councils. See eg Clarence City Council, *Tree Lopping, Removal and Preservation* (8 September 2015) <<http://www.ccc.tas.gov.au/page.aspx?u=1856>>; Kingborough Council, *Private Land – Tree Removal* (2011) <<http://www.kingborough.tas.gov.au/page.aspx?u=733>>; Launceston City Council, *Trees and Nature Strips* <<http://www.launceston.tas.gov.au/lcc/index.php?c=180>>; Break O'Day Council, *Tree Removal* (2010) <<http://www.bodc.tas.gov.au/development/tree-removal>>.

²⁰¹ Submission of Clarence Council (response to Question 4, IP 19).

²⁰² The NSWLRC recommended prior to the adoption of a regime to deal with problem trees in that jurisdiction, that local councils be the primary decision makers in tree disputes. That recommendation was not implemented, and jurisdiction for tree disputes was given to the Land and Environment Court. See NSWLRC, *Neighbour and Neighbour Relations*, Report No 88 (1988) 30–32.

would mean that decisions (or ‘cases’) would not be adversarial in nature and could be assessed much in the same way that councils currently arrive at tree removal or lopping decisions. There are however, problems with this approach. Prior to the adoption of a statutory scheme in the UK, a similar proposal to amend planning regulations to incorporate rules aimed at protecting the ‘amenity value of land’ by stipulating uniform hedge heights was made in the UK.²⁰³ In rejecting this proposal the government noted that such an approach would be ‘disproportionate’ as it would presumably apply to all hedges (both existing and future) regardless of whether they posed a problem or not. This would mean that permits (or exemptions) would potentially be required for all hedges (or trees) in a relevant area, which would otherwise not be required, thereby placing a significant burden on local authorities. Moreover, it was pointed out that there could be practical difficulties with this approach as ‘people might be uncertain as to as what point a growing hedge exceeded the height limit and thus required planning permission.’²⁰⁴ Compliance and enforcement could also prove challenging for both local authorities and property owners alike.²⁰⁵ As these issues would most probably be relevant to the implementation of such a scheme in Tasmania, the Institute does not agree that council involvement through the amendment of local planning schemes to address tree or hedge heights should be pursued.

(b) A model with a local council as the initial decision making authority with appeal rights to the Administrative Appeals Division of the Magistrates’ Court of Tasmania

5.4.14 The considerations and comments above in relation to (a) apply equally to this model; there was strong council opposition to council involvement, particularly from Clarence Council, LGAT and northern Councils.

(c) A model where application is made directly to the court

Submissions

5.4.15 LGAT submitted there was some support amongst its members for a model where an application is made directly to a court, but only if the applicant has first made reasonable attempts to resolve the issue with the neighbour. Clarence Council submitted, as noted, that councils should not be involved in any decision making process in regard to disputes about trees or hedges on neighbouring land. The Council argued that,

The objective of any statutory scheme should be to provide a simple, relatively inexpensive and accessible method for neighbours to resolve disputes relating to hedges. A separate statutory scheme in which a court or tribunal can take evidence, consider case law and make binding orders is the most suitable way to deal with disputes alleging a hedge has restricted view[s] or sunlight.

5.4.16 Later, the Council, seeming to favour a court rather than a tribunal as the most suitable venue for these types of disputes, argued that a ‘court has expertise in the area of nuisance that has been built up over a substantial period of time and consequently is the most appropriate body to hear disputes relating to hedges.’

The Institute’s view

5.4.17 There was limited support amongst the responses for a model where a court was the primary decision maker in disputes between neighbours about trees or hedges. Support for this model was predominantly from LGAT and Clarence Council. However, their submissions revealed that their

²⁰³ See discussion in Elena Ares, *High Hedges Bill*, House of Commons Library Research Paper 01/20 (7 March 2001) 9.

²⁰⁴ United Kingdom, *Parliamentary Debates*, House of Lords, 11 January 2000, c 611 (Baroness Farrington of Ribbleton), quoted in *ibid* 9.

²⁰⁵ See also the 2009 review of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) which also rejected this approach: Department of Justice and Attorney-General (NSW), above n 59, 34.

primary concern was that councils not be involved in tree or hedge disputes rather than providing much in the way of positive support for the use of courts as primary decision makers.

5.4.18 For the reasons outlined below in relation to (d) ‘a variant model’ the Institute is of the view that a tribunal would be a more suitable forum for the resolution of disputes about trees and hedges on neighbouring land.

(d) A variant model

5.4.19 While there were no submissions that indicated support for a variant model to the models that were suggested in IP 19, the Institute supports a model where applications are made to RMPAT with appeals to a court.²⁰⁶

5.4.20 The main advantage of providing RMPAT with jurisdiction over neighbour disputes about trees and hedges is that the Tribunal already has the relevant expertise in planning and other related matters, such as assessing the access of sunlight or the obstruction of views as well as concerns related to amenity, that are likely to be considerations in such disputes. Moreover, if a statutory scheme is adopted that requires certain planning conditions be taken into account,²⁰⁷ it would be a relatively straightforward matter for the Tribunal to assess the degree of compliance in individual cases. Further, the Tribunal is a flexible, efficient²⁰⁸ and cost effective forum for hearing such disputes.²⁰⁹ Proceedings conducted at the Tribunal are not bound by the rules of evidence²¹⁰ and importantly, in light of Recommendation 3, RMPAT procedures require that the Tribunal consider whether the parties should be directed to use mediation services.²¹¹

Recommendation 4

That jurisdiction to hear disputes about trees and hedges on neighbouring land that obstruct the access of sunlight or views be vested in the Resource Management and Planning Appeals Tribunal.

Particular features of a statutory model

Reasonable attempts to resolve the issue

5.4.21 Question 5 of IP 19 (and Question 4 of the submission template) asked if legislation is adopted to address this issue whether it should include a requirement that an applicant make all reasonable attempts to resolve the issue before having recourse to any statutory remedy.

5.4.22 As discussed above in Part 4 (see also [5.3.7]), the statutory schemes that have been implemented in NSW and Queensland both require applicants to have first made a reasonable effort to

²⁰⁶ The Institute is aware that there is at the time of writing a consultation underway on the desirability of amalgamating the various tribunals in operation in Tasmania into a single tribunal. If this were to occur, the Institute would support giving jurisdiction over tree or hedge disputes to the single tribunal. See Department of Justice, *A Single Tribunal for Tasmania*, Discussion Paper (September 2015).

²⁰⁷ For example compliance with any relevant baseline in Tasmanian Planning Commission, *Planning Directive No. 4.1 – Standards for Residential Development in the General Residential Zone* (2014) (‘PD4.1’).

²⁰⁸ Section 16 of the *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) stipulates that Tribunal proceedings are to be conducted ‘with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before the Appeal Tribunal permits.’

²⁰⁹ The fees associated with proceedings at the Tribunal vary according to the matter. See: <http://www.rmpat.tas.gov.au/_data/assets/pdf_file/0008/285956/150525_-_TABLE_OF_FEES_-_2014_-_2015.pdf>.

²¹⁰ *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) s 16(c).

²¹¹ *Ibid* s 16A.

resolve the issue with their neighbour before the Court or Tribunal can make an order.²¹² The statutory schemes in those jurisdictions are supported by free community based dispute resolution as well as policy documents to encourage the early resolution of these kinds of disputes with the goal of lessening reliance on recourse to these more formal legal avenues. In NSW, the kind of effort that would indicate that a reasonable effort has been made is left open.²¹³

Submissions

5.4.23 A large majority of respondents to IP 19 and the submission template²¹⁴ were of the view that there should be a requirement that an applicant make reasonable attempts to resolve the issue before recourse to a statutory remedy is provided. Clarence Council commented that, '[i]t would be appropriate that any legislation would require the applicant to prove that he or she has made all reasonable attempts to mediate the hedge dispute with his or her neighbour. This would encourage applicants to at least discuss their complaint regarding the hedge before commencing legal action'.²¹⁵ An anonymous submission argued that evidence of reasonable attempts to resolve the dispute should be required as a matter of course, and that such attempts should entail the provision of a formal statement of the issue and a reasonable offer for resolution, amongst other things. Another submission commented that there should be a high threshold before access to the court is granted, which should only occur as a last resort.²¹⁶

The Institute's view

5.4.24 The Institute agrees that there should be a requirement that applicants try to resolve a dispute prior to being granted access to a statutory remedy and that reasonable efforts should be made by neighbours to resolve tree or hedge disputes informally. The use of alternative forms of dispute resolution (if feasible in the particular dispute) should be encouraged so as to preserve goodwill between neighbours.²¹⁷ The importance of promoting the informal resolution of these disputes is recognised in s 60(1) of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) which encourages neighbours to 'resolve the issue informally'. The Act also requires neighbours to have made a reasonable effort to reach an agreement before QCAT can make an order. This is also a requirement in NSW under s 14E(1)(a) of the *Trees (Disputes Between Neighbours Act) 2006*, which stipulates that prior to making an order, the Court must be satisfied that the applicant has made a reasonable effort to reach an agreement with the landowner. A review of the operation of the NSW Act found that the time requirements imposed by the Act (there is a 21 day period required between the serving of an application and preliminary directions hearing) have provided an opportunity for parties to reach an agreement before proceeding with a case. The review found that '[a]bout 18% of all Part 2A matters [high hedges that obstruct sunlight or views] are discontinued'.²¹⁸

5.4.25 Both the NSW and Queensland statutes require that a neighbour must have made 'a reasonable effort to reach an agreement' prior to the court or tribunal being able to make an order

²¹² In NSW see *Trees (Disputes Between Neighbours Act) 2006* (NSW) s 14E(1)(a); in Qld see *Neighbourhood Disputes (Dividing fences and Trees) Act 2011* (Qld) s 65.

²¹³ This was discussed in relation to s 10(1)(a) of the NSW Act (which is the same as s 14E(1)(a)) in the case of *Robson v Leischke* [2008] NSWLEC 152, [191]–[196].

²¹⁴ Of the nine respondents to IP 19 who answered this question, all thought that this should be a requirement and 11 out of the 15 respondents to the Submission Template thought that this should be a requirement.

²¹⁵ Submission of Clarence Council (response to Question 5, IP 19).

²¹⁶ Submission of Eric Lockett (response to Question 5, IP 19).

²¹⁷ Some councils recommend landowners engage mediation services where they have issues about a neighbour's tree or hedge: see eg, Break Break O'Day Council, Street Tree Pruning (2010) <<http://www.bodc.tas.gov.au/development/tree-removal>>.

²¹⁸ Department of Justice and Attorney-General (NSW), above n 59, 9.

under the relevant Act. In the NSW case of *Robson v Leischke*,²¹⁹ the Court (citing *Antipas v Kutcher*)²²⁰ noted in determining whether all reasonable attempts had been made, that:

- the applicant is not required to negotiate exhaustively;
- the applicant need not demonstrate a willingness to meet all demands;
- the court should objectively consider all the circumstances of the case; and
- the requirement is satisfied when (objectively) it is highly unlikely that further negotiations will resolve the issue.²²¹

5.4.26 The Institute recommends that as a threshold requirement, applicants should make reasonable attempts to resolve the dispute before the tribunal has jurisdiction to determine the case as this may provide an impetus for neighbours to resolve disputes prior to seeking access to any remedy. Evidence that parties have engaged or attempted to engage in some form of ADR (if appropriate in circumstances) should be considered to satisfy any requirement that reasonable attempts to resolve the dispute have been made.

Recommendation 5

- If legislation is implemented, it should include a requirement that an applicant has made reasonable attempts to resolve the tree or hedge dispute before the court or tribunal may make an order in respect of the tree or hedge.
- If parties have engaged or attempted to engage in ADR, this should be regarded as evidence that reasonable attempts have been made to resolve the dispute.

Defining the degree of obstruction

5.4.27 Question 6 of IP 19 (and the submission template) asked how the degree of obstruction of sunlight or a view should be defined. That is, what standard should be adopted in legislation as a threshold that must be met before a court or tribunal will make an order. Several options were provided:

- (a) by reference to its severity; and/or
- (b) by reference to the owners' use and enjoyment of the land; and /or
- (c) by reference to a 'reasonable' person's use and enjoyment of the land; and/or
- (d) otherwise?

5.4.28 *Severe obstruction of sunlight or views*: this is the standard that is used in NSW. Section 14E(2) of the *Trees (Disputes Between Neighbours Act) 2006* (NSW) requires not only that the trees are severely obstructing sunlight (to a window) or views (from a dwelling), but also that the severity of the obstruction is such that the 'applicant's interest in having the obstruction removed, remedied or restrained outweighs any other matters that suggest the undesirability of disturbing or interfering with the trees...' This means that even if the Court finds that there is severe obstruction of sunlight or views, regard must still be had to the discretionary factors listed in the Act (in s 14F) in order to 'balance the interests of the applicant in removing the obstructions against those of the trees and the

²¹⁹ [2008] NSWLEC 152.

²²⁰ (2006) 144 LGERA 289, [14].

²²¹ Ibid [195]-[196].

tree owner.²²² As a result of these requirements, the threshold for intervention is set quite high and has been held to require obstruction that is greater than ‘moderate annoyance or inconvenience.’²²³

5.4.29 Substantial, ongoing and unreasonable interference with the use and enjoyment of land (only if obstruction is severe): This is the standard that must be met in Queensland before the Tribunal can make an order in relation to trees on neighbouring land that obstruct access of sunlight or views.²²⁴ In *Laing & Anor v Kokkinos & Anor (No 2)* (in relation to the obstruction of views), the Tribunal held that ‘severe’ means that the ‘obstruction must be considerable’.²²⁵ The Tribunal also cited the then Attorney-General’s comments during the second reading of the *Neighbourhood Disputes Resolution Bill 2010* Bill to the effect that ‘[t]he severity threshold requires that the view must be nearly blocked out’²²⁶ to further clarify what was meant by this term. Thus, as in NSW, the jurisdictional threshold is set quite high. The term ‘interference’ as used in the Act, includes an obstruction of view²²⁷ (and of sunlight) — ie the obstruction of a view or of sunlight can be a type of ‘interference’ with the reasonable enjoyment of land under the Act. Again, as in NSW, even if the obstruction is found to be severe, the Tribunal must balance the interests of the applicant and the tree-keeper by considering the matters listed in ss 73 and 75 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld). These considerations also include the requirement in s 72 that the destruction of a living tree is to be avoided unless the issue cannot otherwise be resolved.

5.4.30 Reasonable enjoyment of the land: In the UK the degree of interference is assessed with reference to the complainant’s *reasonable* enjoyment of the property. This sets a lower threshold than either the NSW or Queensland legislation but it still acknowledges that the right to light or a view is not unfettered. The factors that are relevant to determining if such interference is unreasonable are sourced from policy documents and will not normally include factors such as the effect of the hedge on the complainant personally, the effect of the hedge on the activities that the complainant engages in on the property, and the complainants feelings about the hedge.²²⁸

5.4.31 The guidelines also indicate that the words ‘reasonable enjoyment’ import a degree of objectivity into the test for interference. So, for example, an obstruction of light should be assessed from the perspective of the amount of sunlight that might reasonably be expected to be available rather than the amount of sunlight to which the individual complainant expects to have access.²²⁹ Whilst this is not made explicit in the Act, it accords with the generally accepted understanding of the

²²² Land and Environment Court NSW, *Annotated Trees Act* (2015) 34 <http://www.lec.justice.nsw.gov.au/Documents/annotated_trees_act_january_2013%20-250313.pdf>.

²²³ *De Zylva & anor v Staas & anor* [2012] NSWLEC 1242, [31]. In terms of obstruction of views, in *Haindl v Daisch* [2011] NSWLEC 1145 it was held that an assessment of the severity of obstruction involves both ‘quantitative and qualitative elements’: at [64]. The Court also referred to the [planning] principles set out in *Tenacity Consulting v Warringah* [2004] NSWLEC 140, and held that these principles were relevant to assessing the severity of impacts on views under Part 2A of the *Trees Act*: at [65]–[69]. According to these principles, the first step involves an assessment of the ‘views to be affected’, eg water vs land views; the second step involves a consideration of from ‘what part of the property the views are obtained’; the third step involves an assessment of the ‘extent of the impact’. In this regard, ‘[i]t is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating’: at [67].

²²⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 66(2)(b)(ii), (3)(b).

²²⁵ [2013] QCATA 247, [36]. The Tribunal went on to apply the planning principles outlined in NSW case of *Tenacity Consulting v Warringah* [2004] NSWLEC 140 (see n 223). It also referred to the NSW case of *Haindl v Daisch* [2011] NSWLEC 1145, in defining the term ‘view’. It therefore appears that the test for ‘severe obstruction’, at least in relation to a view, is the same in Qld as it is NSW.

²²⁶ Queensland, *Parliamentary Debates (Hansard)*, 2 August 2011, 2309 (Paul Lucas, Attorney-General).

²²⁷ *Laing & Anor v Kokkinos & Anor (No 2)* [2013] QCATA 247, [5].

²²⁸ Office of the Deputy Prime Minister (UK), *High Hedges Complaints: Prevention and Cure* (May 2005) 19 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/11476/highhedgescomplaints.pdf>.

²²⁹ *Ibid* 19–20.

effect of a test expressed in terms of reasonableness. The policy document also suggests that the council will consider what is reasonable in the circumstances.²³⁰

Submissions

5.4.32 When asked how the degree of obstruction should be defined, an equal number of respondents (10 across both methods of response) chose (a) ‘by reference to its severity’ and, (c) ‘by reference to the “reasonable” use and enjoyment of the land’.²³¹ These options were closely followed by (b) ‘by reference to the owners’ use and enjoyment of the land’, with eight respondents choosing this option.

5.4.33 Clarence Council submitted that any legislation that was enacted should define the degree of obstruction by its severity and by a reasonable person’s use and enjoyment of the land: ‘[t]he definition of degree of obstruction should act as a threshold test to determine how severe the obstruction is and whether the obstruction would interfere with a reasonable person’s use and enjoyment of the land in the circumstances.’²³² This is similar to the threshold test that is applied in Queensland. LGAT indicated that councils generally supported defining the degree by its severity or by reference to the reasonable use and enjoyment of land.²³³ Other submissions commented that available day light hours and sun angles should be relevant considerations in assessments of the severity of the obstruction of light.

The Institute’s view

5.4.34 The Institute is of the view that the degree of obstruction should be defined by reference to its severity. That is, an order to interfere with a tree or hedge should not be made unless the obstruction that is caused by the tree or hedge to the access of sunlight or a view is severe. Such an approach will set a high threshold before an order requiring interference with a tree or hedge is permitted. This, in turn, may reduce the number of unmeritorious claims and help to provide an appropriate balance between the rights of property owners.

5.4.35 This approach is similar to the legislative requirement in NSW that the Court must not make an order unless it is satisfied that trees are severely obstructing sunlight to window or a view from a dwelling. It is also accords with the law in Queensland (without importing the ‘substantial, ongoing and unreasonable interference’ requirement), where an obstruction of sunlight or view must also be severe before the Tribunal may intervene. The adoption of the ‘severe obstruction’ standard in Tasmania would also have the advantage of maintaining consistency with these jurisdictions, thereby allowing relevant Tribunal and Court interpretations from those jurisdictions to inform the development of the law in Tasmania. The experience in NSW indicates that there is no disadvantage to not referencing the applicant’s use and enjoyment of land, or a reasonable person’s use and enjoyment of land.

5.4.36 In terms of the content of this requirement — ie what *is* a severe obstruction, in NSW the Court’s interpretation of severity has been informed by planning law. For example, the NSW Land and Environment Court has applied the ‘usual development standards for sunlight’ contained in local planning schemes in assessing whether obstruction of sunlight to the window of a dwelling is severe.²³⁴ Similarly, in relation to views the Court has applied the principles developed in the planning decision of *Tenacity Consulting v Warringah Shire Council* (*‘Tenacity Consulting’*).²³⁵ These

²³⁰ Ibid.

²³¹ Seven respondents to IP 19 and three respondents to the Submission Template chose this option, one respondent to IP 19 and nine respondents to the Submission Template chose (c). Respondents could select more than one response.

²³² Submission of Clarence Council (response to Question 6, IP 19).

²³³ Submission of LGAT (response to Question 6, IP 19).

²³⁴ Land and Environment Court NSW, above n 222, 33; eg see *Clancy v Bell* [2011] NSWLEC 1017.

²³⁵ [2004] NSWLEC 140, as applied in *Haindl v Daisch* [2011] NSWLEC 1145, [65]–[69].

principles involve a four-step process to assess issues associated with impacts on views and view sharing.²³⁶ The principles developed in *Tenacity Consulting* have also been applied by the Tribunal in Queensland.²³⁷

5.4.37 The Institute is of the view that, as in other jurisdictions, the content of planning requirements that pertain to built structures, if relevant, might inform decisions regarding trees and hedges. This will maintain consistency between planning laws and any scheme that is adopted to deal with the issue of problem trees or hedges.²³⁸

Recommendation 6

That the obstruction caused by trees or hedges to the access of sunlight or a view must be ‘severe’ before intervention is warranted.

The subject property

5.4.38 Question 7 of IP 19 (and question 5 of the submission template) asked whether the obstruction of sunlight should relate only to a dwelling or whether it should extend to the land itself.

5.4.39 In NSW a remedy is only provided if sunlight to the window of a dwelling is severely obstructed by a neighbour's trees or hedges.²³⁹ Decks and balconies form part of the dwelling.²⁴⁰ The *Trees (Disputes Between Neighbours) Act 2006* (NSW) does not apply to the severe obstruction of sunlight to a garden or to solar panels on the roof of a dwelling.²⁴¹ In Queensland, while the obstruction of sunlight must also be to a dwelling, unlike NSW, the obstruction can be either to a window or the roof of a dwelling. This means that if a neighbour's tree or hedge severely obstructs sunlight to a solar panel, an application can be made to remedy the situation.²⁴² The position in the UK is different again; under the UK Act the relevant interference must be to the ‘domestic property’, which is defined to include both a dwelling and grounds connected to the dwelling.²⁴³ However, the UK legislation also places restrictions on the type of vegetation that can form the basis of a complaint — there must be a line of two or more evergreens or semi-evergreens.²⁴⁴

²³⁶ The steps involved in assessing views as developed in *Tenacity Consulting v Warringah* [2004] NSWLEC 140 are as follows: the first step involves an assessment of the ‘views to be affected’, eg water vs land views; the second step involves a consideration of from ‘what part of the property the views are obtained’; the third step involves an assessment of the ‘extent of the impact’. In this regard, ‘[i]t is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating’: at [25]–[29].

²³⁷ *Laing & Anor v Kokkinos & Anor (No 2)* [2013] QCATA 247, [39]–[41].

²³⁸ Currently, PD4.1 provides baseline standards for the opportunity of sunlight to enter habitable rooms of dwellings as well as for the reasonable opportunity for privacy among other things. These standards could provide guidance in some circumstances when considering whether an order in respect of a tree or hedge may be warranted. While views are not addressed in PD4.1, they are related to amenity considerations and have been considered in planning appeals by the Tribunal in decisions such as *Arms Investments Pty Ltd v Hobart City Council* [2006] TASRMPAT 63, or *M & R Loughhead & Ors v Hobart City Council and Hobart City Council (Applicant)* [2015] TASRMPAT 13, [113]–[135]. Further guidance as to the content of a severe obstruction of a view could be informed by decisions such as that in *Tenacity Consulting* [2004] NSWLEC 140.

²³⁹ *Trees (Disputes Between Neighbours Act) 2006* (NSW) s 14E(2). A window is defined in s 3 of the Act to include ‘a glass sliding door, a door with a window, a skylight and any other similar thing.’

²⁴⁰ *Campbell v Voller* [2010] NSWLEC 1351, [31].

²⁴¹ *Hendry & anor v Olsson & anor* [2010] NSWLEC 1302, [29]–[30].

²⁴² See Queensland Government, above n 173, 32.

²⁴³ *Anti-social Behaviour Act 2003* (UK) c 38, s 67(1).

²⁴⁴ *Ibid* s 66. In New Zealand, s 335(1)(b)(iv) of the *Property Law Act 2007* stipulates that an order must be necessary to prevent ‘an undue interference with the use or enjoyment of the applicant’s land by reason of ... shade or interference with access to light’.

Submissions

5.4.40 Amongst those who responded to IP 19, the majority considered that the obstruction should relate to the dwelling and land, with six of nine submissions preferring this option. Respondents to the submission template provided much greater support for including land as well as a dwelling with 15 out of 16 respondents choosing this option.

5.4.41 In the comments that were provided to this question, Clarence Council noted that legislation, if enacted, should ‘balance the rights of a property owner to plant vegetation to provide shade, privacy etc against another property owner’s concerns for accessing sunlight and views.’²⁴⁵ Others commented that the land on which the dwelling is located should be included but that there should be restrictions. For example, access of sunlight to principal outdoor living areas should be included,²⁴⁶ or that the obstruction of sunlight within close proximity to the property boundary could be excluded.²⁴⁷

The Institute’s view

5.4.42 The 2013 review of the high hedge provisions in the NSW Act examined the Act’s impact on residential amenities. It was noted in the review that the ‘most common concern [in submissions made to the review] related to the impact of high hedge shade ... on the general use of residential amenities, particularly gardens.’²⁴⁸ Ultimately, the review reaffirmed the Act’s application to hedges that only ‘affect people’s homes (rather than their gardens or other structures on their property)’ noting that this was in-keeping with the intended restrictive nature of that aspect of the Act.²⁴⁹ The review reasoned that the Act ‘must strike a balance between competing neighbouring rights, such as privacy and the enjoyment of land, and the utility of the urban forest’²⁵⁰ and concluded that there was no need to alter how this balance had been struck within the Act by including the obstruction of sunlight to gardens.

5.4.43 Despite refusing to extend the scope of the Act to include the roof of a dwelling, the review did note that there were potential positive environmental aspects to broadening the Act to include the loss of sunlight²⁵¹ to roofs and consequently solar panels. This is the position in Queensland, where ‘unreasonable interference’ with the enjoyment of land includes the severe obstruction of sunlight to a dwelling, including the roof of the dwelling.²⁵² Therefore, a tree that blocks sunlight to solar panelling on the roof of a dwelling can form the basis of an application to QCAT.²⁵³

5.4.44 Although most submissions to IP 19 supported including the obstruction of sunlight to the land as well as to the dwelling, the Institute is of the view that a better balance between the rights of neighbours would be achieved by restricting the obstruction of sunlight to a dwelling — including the roof of the dwelling. This recognises the importance of access of sunlight to dwellings²⁵⁴ and the potential environmental (and economic) benefits of including a means to protect access of sunlight to rooftop solar panels.²⁵⁵ However, if land were to be included, trees that have no, or minimal impact on

²⁴⁵ Submission of Clarence Council (response to Question 7, IP 19).

²⁴⁶ Submission of June Noble (response to Question 7, IP 19).

²⁴⁷ Anonymous submission (response to Question 7, IP 19).

²⁴⁸ See Department of Justice and Attorney General (NSW), above n 67. There were eight complaints of this nature: at 13. The review received 36 submissions in total: at 2.

²⁴⁹ Ibid 13.

²⁵⁰ Ibid 16.

²⁵¹ Ibid 14. Ultimately the review did not recommend extending the Act’s provisions to include solar access to roofs: at 16.

²⁵² *Neighbourhood Disputes (Dividing fences and Trees) Act 2011* (Qld) s 66.

²⁵³ See eg, *Durrington and Kruger v Cassar and Anor* [2014] QCAT 609, [15]; see also, Queensland Government, above n 173, 32.

²⁵⁴ See eg Tasmanian Planning Commission, above n 207, Directive 10.4.4.

²⁵⁵ The Tasmanian Energy Strategy notes that in relation to the growth in the uptake of solar photovoltaic systems in Tasmania that, ‘regulatory arrangements need to support consumers’ rights to take up new technologies, while also

a dwelling could be the subject of an application. This in turn may serve to increase the number of applications and could have greater implications for privacy, amenity and the environment.

Recommendation 7

That in any scheme that is adopted, the obstruction of sunlight caused by a neighbour's tree must be to a dwelling, including the roof of the dwelling, on the applicant's land.

Malicious intent

5.4.45 Question 8 of IP 19 (and Question 7 of the submission template) asked whether malicious intent in the planting (or non-maintenance) of a hedge should be a requirement in any prospective scheme enacted to respond to the issue of hedges that block sunlight or a view. IP 19 presented three options:

- (a) there needs to be malicious intent in the planting of a hedge or its non-maintenance to obstruct sunlight or a view before a remedy is provided; or
- (b) there needs to be malicious intent in the planting of a hedge or its non-maintenance to obstruct sunlight or a view, and in resolving the issue the court must balance the rights of property owners to legally plant or do anything on their land that they desire; or
- (c) that in resolving the issue the court must balance the rights of property owners to plant or do anything on their land that they desire but that the legislation not require any consideration of whether a hedge was planted or not maintained for malicious reasons?

Submissions

5.4.46 Of the eight submissions to IP 19 that addressed this question, there was no support for either (a) or (b). One anonymous submission indicated (after questioning whether the issue was significant enough to warrant a remedy at all), that if malicious motivation could be established, then a remedy should be provided that was proportionate (whether in 'relation to planting the hedge or making the application').²⁵⁶ All other submissions supported (c) that the court balance the neighbours' rights and that maliciousness not be a factor. Clarence Council submitted that any proposed legislation should balance the rights of property owners and that maliciousness should not be a consideration as it would be difficult either to prove or disprove. Another submission pointed out that it should not be relevant for the purpose of any legislation whether 'the tree owner is malicious or merely inconsiderate.'²⁵⁷

5.4.47 Similarly, most submissions to the submission template did not support requiring maliciousness as a prerequisite to granting a remedy. Of the 14 responses to this question, 11 selected (c) — that intent should not be a factor and that the court or tribunal should attempt to balance the respective rights of neighbours.

The Institute's view

5.4.48 The Institute agrees with the majority of submissions that in any scheme that is adopted malicious intent in the planting or non-maintenance of a hedge or tree that blocks the access of sunlight or a view should not be a requirement in order for an applicant to seek relief. The difficulty of proving intention in the planting of a tree or hedge would present an unreasonable barrier to those seeking redress. Malicious intent is not a requirement in the other Australian jurisdictions that have enacted legislation to respond to this issue, nor is it a requirement in New Zealand or the UK.

ensuring there are no unintended cross-subsidies from other end users.' See Tasmanian Government, *Restoring Tasmania's Energy* (7 May 2015) Department of State Growth, 8 <<http://www.stategrowth.tas.gov.au/energy/strategy>>.

²⁵⁶ Anonymous submission (response to Question 8, IP 19).

²⁵⁷ Submission of June Noble (response to Question 8, IP 19).

5.4.49 Requiring the decision maker to balance the rights of a person to do on his or her own land as he or she wishes, and the corresponding right of a neighbour to be free from interference to enjoy the land is, in the Institute's view, a better approach to the resolution of neighbour disputes about trees and hedges. This is the position in both NSW and Queensland, where the Court/Tribunal is required, after the jurisdictional threshold for intervention has been met, to consider a list of factors in deciding what action, if any, is warranted in relation to the tree or hedge.²⁵⁸ These factors are similar in both jurisdictions (see above at 4.2.4 in relation to NSW and 4.3.12 in relation to Queensland).

Recommendation 8

That malicious intent in the planting or non-maintenance of a tree or hedge not be required (nor a consideration) before an order may be made in respect of that tree or hedge.

Sunlight and/or views

5.4.50 Question 9 of IP 19 asked: if a statutory scheme were to be adopted, should it seek to remedy an obstruction of sunlight, an obstruction of a view, or both? Similarly, Question 8 of the submission template asked what type of blockage should be covered by a statutory scheme: sunlight, views or both?

5.4.51 Prior to amending the *Trees (Disputes Between Neighbours Act) 2006* (NSW) to include obstructions of sunlight and views, the NSW government canvassed arguments both for and against extending the Act to cover these issues. The relevant arguments noted in the review are summarised below:²⁵⁹

Arguments against extending the Act to cover sunlight or views —

- There could be a considerable loss of canopy across all urban areas of NSW which is undesirable due to the community benefits that trees provide such as:
 - absorbing noise,
 - filtering toxic particles from the air,
 - maintaining nutrient levels in the soil,
 - reducing erosion, salinity and stormwater run-off,
 - providing windbreaks,
 - underpinning local ecosystems and providing a habitat for flora and fauna,
 - removing carbon-dioxide from the atmosphere,
 - moderating extremes of temperature in their immediate vicinity.
- There are legitimate reasons why a property owner may wish to retain a tree on their property including privacy, shade and aesthetic considerations; and
- Requests for pruning for reasons of access to light or a view are vulnerable to abuse where they are used as an avenue for vexatious complaints about a neighbour;
- It may be difficult for the court to be consistent in its decision making in regard to views because:

²⁵⁸ See *Trees (Disputes Between Neighbours Act) 2006* (NSW) s 14F; *Neighbourhood Disputes (Dividing fences and Trees) Act 2011* (Qld) s 73. See also Department of Justice and Attorney-General (NSW), above n 59, 35–37. The factors which must be considered by local authorities in the UK are similar: see Office of the Deputy Prime Minister (UK), above n 228, [5.54]–[5.64], [5.90]–[5.91].

²⁵⁹ See Department of Justice and Attorney-General (NSW), above n 59, 29–32. These factors were also listed in IP 19. See TLRI, above n 11, [4.2.2].

- While some views can be considered desirable and may add value to the land, there is still an element of subjectivity to these, as well as to other views,
- The removal of a tree in order to secure a neighbour's access to a view could negatively affect a nearby resident.

Arguments in favour of extending the Act to cover sunlight and views —

- Severe loss of sunlight can lead to loss of amenity and enjoyment of a person's home, increase damp and reduce airflow;
- Some trees can be planted to form a row which effectively blocks the line of sight from a neighbour's home, however there is currently no avenue for a neighbour to have input into the nature of the hedge, its size or shape;
- The desire to retain amenity can be subject of many disputes between neighbours;
- The common law of nuisance provides little protection against loss of amenity in relation to sunlight and views;
- Planning controls only apply to landscaping matters and the planting of specific species as part of an initial development consent but not otherwise;
- Some submissions alleged neighbours had planted hedges to effectively negate view-sharing conditions in their development approvals;²⁶⁰
- The fact that there is no legal mechanism to resolve disputes means people may resort to illegal means such as poisoning trees. Currently the law provides little incentive for individuals to negotiate a resolution;
- Mediation through community justice centres is useful in resolving some disputes but is not suitable in a number of cases.²⁶¹

5.4.52 After noting that the review had received a large number of submissions on this issue, which were almost all in favour of extending the Act, the review concluded that the Act should be amended to cover trees that blocked the access of sunlight and to views.²⁶² However, it was stressed that any such procedure should require the Court to balance the rights of neighbours and that care should be taken not to create a new legal right of solar access or a view.²⁶³

5.4.53 In Queensland, the review of neighbourly relations that was held prior to the adoption of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) asked whether in light of common law nuisance it was reasonable to expect that a neighbour have a right to sunlight or to protect or maintain a view.²⁶⁴ The results of the consultation on the subsequent draft Bill noted that in relation to views, members of the community generally approved of protecting a previously existing view.²⁶⁵ (While the results of the consultation do not specifically mention access of sunlight, it can be

²⁶⁰ Department of Justice and Attorney-General (NSW), above n 59, 31. A council planning scheme usually specifies the minimum distance between the boundary of a property and the siting of a dwelling. Restrictions can also be imposed on the height of dwellings. Those restrictions become conditions of a development application. The conditions of a development application might also limit the height of a boundary fence. In some instances a property owner might plant a high hedge on a boundary line to protect privacy and in effect circumvent any conditions about maximum height of built structures on the land or boundary setbacks.

²⁶¹ Ibid 29–34.

²⁶² Ibid 34.

²⁶³ Ibid 34–38.

²⁶⁴ Department of Justice and Attorney-General (Qld), *Review of Neighbourly Relations – Discussion Paper: Trees* (2011) 2.

²⁶⁵ Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, *Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process* (2010) 16.

inferred that generally there was community support for this by its inclusion in s 66 of the Act). As in NSW, it was stressed that the Act does not to create a legal right to a view.²⁶⁶

Submissions

5.4.54 Nearly all the submissions to the submission template (16 out of 17) supported including both sunlight and views in any legislative scheme that is adopted to address this issue. Similarly, the majority of submissions (8 out of 10) to IP 19 also supported including both sunlight and views. Clarence Council noted that the implementation of any such scheme could be costly and time consuming and therefore it made sense to extend the scheme to both light and to views.²⁶⁷ In contrast, LGAT noted that there was no consensus amongst councils on this issue but that there seemed to be stronger support for only including sunlight. This seemed to be based on a perception that disputes about views would be ‘highly fraught and difficult to regulate.’²⁶⁸ Another submission noted that if views were included, issues could arise in instances where trees on state-owned land (eg foreshores) were planted for environmental reasons such as re-generation, erosion prevention or habitat protection etc). Subsequently, these trees could end up blocking the views of nearby residents and become subject to applications to restore views despite the environmental objectives for which they were planted. Or, in a worst-case scenario, if residents think that they have a right to a view, they may be more willing to take matters into their own hands.²⁶⁹

The Institute’s view

5.4.55 The Institute agrees with the majority of submissions that any legislative scheme that is implemented to deal with problem trees or hedges should include obstructions of both sunlight and views. The submissions to the Institute confirmed that both sunlight and views are important amenity considerations for many in the community and that their obstruction can significantly affect a person’s enjoyment of the property.

5.4.56 In terms of the potential impact of such a legislative scheme on trees planted by local council (or other government bodies), similar concerns were raised prior to the enactment of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), particularly in relation to re-vegetation efforts (notably along foreshores). In response, the government proposed to re-cast the legislative requirements pertaining to sunlight and views to ‘give primacy to the concerns about re-vegetation due to degradation.’²⁷⁰ Under s 42(2) of the Act, regulations can be made to provide that the Act does not apply to trees that are located on land within a specific local government area and s 42(3) stipulates that the Act does not apply to trees on land owned by local government that is used as a public park. In NSW, the application of the *Trees (Disputes Between Neighbours) Act 2006* is limited by s 4 of the Act and does not apply to trees on land that is managed by, or vested in, a council.²⁷¹

²⁶⁶ QLRC, above n 55, [3.104], quoting *Laing & Anor v Kokkinos & Anor* (No 2) [2013] QCATA 247 [32]. Note also that in relation to the access of light the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) in s 66(4) specifically overrides s 178 of the *Property Law Act 1974* (Qld) which states that there is no presumption of access to light or air.

²⁶⁷ Submission of Clarence Council (response to Question 9, IP 19).

²⁶⁸ Submission of LGAT (response to Question 9, IP 19).

²⁶⁹ Anonymous submission (response to Question 9, IP 19). The poisoning of trees to possibly gain a view was recently reported in the press: See Susan Browning, ‘Dozens of trees poisoned in public park in Kettering an act of “environmental vandalism”; trees block water views of nearby houses’, *Australian Broadcasting Corporation* (online), 8 October 2015 <<http://www.abc.net.au/news/2015-10-08/dozens-of-trees-poisoned-in-public-park-in-kettering/6836514>>.

²⁷⁰ Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, above n 265, 6.

²⁷¹ A number of policy reasons were advanced for not including trees on Council land in the 2009 review of the Act. See Department of Justice and Attorney-General (NSW), above n 59, 24–28.

5.4.57 In order to ensure that trees or hedges planted by local government or other relevant bodies pursuant to environmental and other public policy objectives are protected, consideration should be given to creating an exception in any prospective regime that excludes any such vegetation.

5.4.58 The Institute acknowledges concerns that the protection of views could pose difficulties due to the potentially subjective assessment of their value. However, there is no evidence that this has been an issue in those jurisdictions that have provided an avenue for their protection or restoration. Indeed, the 2013 review of the NSW Act recommended extending the Act's application to land that is zoned rural-residential thereby potentially increasing the number of people who can seek redress for obstructions of sunlight or views.²⁷² In Queensland, the 2015 review of the Act sought submissions on specific aspects of the operation of the Act in relation to views, but it did not suggest that there had been any particular difficulties with the protection of views in general.²⁷³ As noted above, both NSW and Queensland have applied the principles in *Tenacity Consulting*²⁷⁴ in order to help determine when a view has been unduly obstructed. Nevertheless, the Institute stresses that any prospective scheme should not be considered to be creating a right to a view.

Recommendation 9

- The reference to an 'obstruction' in any scheme that is adopted to address this issue should refer to both the obstruction of sunlight and of a view.
- That consideration be given to excluding trees or hedges planted by local government or other relevant bodies pursuant to environmental or other policy objectives.

Minimum heights

5.4.59 Question 10 of IP 19 asked if a statutory scheme were to be adopted, what minimum height should apply to a tree or a hedge before an application to the relevant body could be made to resolve the issue? It also asked respondents to justify their answers. Question 9 of the submission template asked whether a minimum height should be stipulated before an application could be made; and Question 10 of the submission template asked those who were in favour of stipulating a minimum height, why they thought this was desirable.

5.4.60 In NSW, the minimum height of vegetation that is required before an application can be made under the Act is 2.5m above existing ground level. The Court has stressed that this height is merely the threshold at which an application can be made (providing the other jurisdictional tests are met); it does not stipulate the 'height to which all plants must be maintained.'²⁷⁵ The Court has no jurisdiction to make orders in respect of hedges that do not meet this threshold even if they may do so in the future.²⁷⁶ In Queensland the same restriction applies and vegetation must be at a height of at least 2.5m before the Tribunal's jurisdiction is enlivened.²⁷⁷

5.4.61 In the UK, legislation defines a 'high hedge' as one that rises to a height of more than two metres above ground level. However, if the hedge has gaps in it above that height that lessen its impact as a barrier 'to light or access' then it may not meet the jurisdictional threshold in the legislation.²⁷⁸ In order to help householders determine whether a particular hedge is actionable in

²⁷² The Act was subsequently amended to incorporate this recommendation. See *Courts and Crimes Legislation Amendment Act 2015* (NSW) s 4.6.

²⁷³ QLRC, above n 55.

²⁷⁴ [2004] NSWLEC 140; see n 223 above.

²⁷⁵ *McLaren v Lewis* [2011] NSWLEC 1170, [34].

²⁷⁶ *Wisdom v Payn* [2011] NSWLEC 1012, [53]–[59].

²⁷⁷ *Neighbourhood Disputes (Dividing fences and Trees) Act 2011* (Qld) s 66(3)(b).

²⁷⁸ *Anti-social Behaviour Act 2003* (UK) c 38, s 66.

terms of the access of light, the UK government has produced useful guidelines to assist the calculation of the amount of light loss produced by a hedge.²⁷⁹

Submissions

5.4.62 The majority of submissions to IP 19 (five of nine) supported a minimum height of 2.5m in respect of trees or hedges that obstruct the access of sunlight or views before an application can be made in respect of the tree or hedge (including Clarence Council and LGAT). Three submissions noted that any height restriction should be based on relevant planning controls for built structures (including for fences). These submissions also remarked on the potential effect of sloping land, noting that in such cases an exception may be required to the minimum threshold. One submission did not support the inclusion of any minimum threshold for the height of vegetation arguing that such restrictions were inherently flawed due to several factors including: variance in the penetrability of the canopy; the distance and direction of the trees from the neighbouring house; the depth of the canopy (which may not cover the full height of the trees); the slope of the land; and the sun angles at different times of the day and year. Therefore, a better approach, according to the submission, would be to focus on assessing the effect of the tree or hedge in its context.²⁸⁰

5.4.63 The responses to Question 9 of the submission template were equally divided, with eight respondents supporting and eight opposing the stipulation of a minimum height. As noted, Question 10 asked those who were in favour of such a stipulation, why they thought it was desirable. The responses to this question were varied, with some indicating that there should in fact be no prescribed minimum height. The responses of those that answered that there should be a minimum height and left a comment at Question 10 advocated a minimum threshold that ranged from 1.6 to 3m. Two responses noted that educative materials about suitable vegetation and its maintenance should be made available.

The Institute's view

5.4.64 If a minimum height is to be prescribed, the Institute agrees with the majority of submissions that trees or hedges that obstruct the access of sunlight or views be required to obtain a minimum height of 2.5m before an application may be made to a court or tribunal. A minimum height of 2.5m would provide an appropriate balance of neighbours' rights and would accord with the laws pertaining to trees and hedges in both NSW and Queensland.²⁸¹

5.4.65 IP 19 noted that '[l]ocal government planning controls already exist which govern the height of built structures and fences in order to protect access of light and in some instances a view. Trees planted to form a hedge have essentially the same effect and should therefore be subject to similar height controls.'²⁸² A minimum height of 2.5m is slightly greater than the standard of either 1.2m or 1.8m prescribed in PD4.1 for the height of fences (in the general residential zone).²⁸³ Providing a slightly greater minimum height than that which is required for such structures before a tree or hedge

²⁷⁹ According to the author(s): 'The procedure is intended to be simple enough for householders to use. It involves multiplying the distance from a window to the hedge, or the depth of the garden, by a factor; for gardens this factor depends on hedge orientation. Corrections can be made for site slope or where the hedge is set back from a garden boundary.' Office of the Deputy Prime Minister (UK), *Hedge Height and Light Loss* (8 April 2004) 5 <<https://www.gov.uk/government/publications/hedge-height-and-light-loss>>.

²⁸⁰ Submission of Eric Lockett (response to Question 10, IP 19).

²⁸¹ In terms of the privacy provided by hedges, the UK policy guidance suggests that, '[i]n general, the level of privacy provided by a 2 metre high hedge is what might reasonably be expected in most urban and suburban situations': Office of the Deputy Prime Minister (UK), above n 228, [5.58].

²⁸² TLRI, above n 11, [4.4.20]. See generally Tasmanian Planning Commission, above n 207.

²⁸³ Generally, building envelopes are determined by locating a 'distance equal to the frontage setback' and then 'projecting a line at an angle of 45 degrees from the horizontal at a height of 3 m above natural ground level at the side boundaries and a distance of 4 m from the rear boundary to a building height of not more than 8.5 m above natural ground level...' Tasmanian Planning Commission, above n 207.

can become subject to an order under any prospective scheme, creates an allowance for the fact that trees and hedges are living, growing plants. If a hedge is required to be reduced to a particular height (the minimum being 2.5m) it would be prudent to reduce the height to a point somewhere below this in order to allow a margin for regrowth. Indeed, in the UK, the guidance on calculating light loss caused by hedges recommends that if a hedge is required to be trimmed, that it is done so to a level below the ‘action hedge height’ to allow a ‘growing margin’ or buffer zone. The guidance recommends that this margin be between 600mm and 1m.²⁸⁴

5.4.66 In terms of sloping land, it is acknowledged that trees or hedges that are below the height of 2.5m could potentially have a greater effect on the obstruction of sunlight or views than taller vegetation located on flatter land. However, these effects are not likely to be significant in most cases, and have not proven to be a difficulty thus far in other jurisdictions.²⁸⁵

Recommendation 10

If a legislative scheme is adopted to address trees or hedges that obstruct sunlight or views, that it not apply to trees or hedges that are below a height of 2.5 metres.

Hedges and single trees

5.4.67 Question 11 of IP 19 and the submission template asked whether the legislation should apply to vegetation that is planted to form a hedge-like structure, or whether it should also apply to single trees.

5.4.68 NSW and Queensland have taken different approaches to this issue, with NSW requiring that there be two or more trees and that the vegetation must not be self-sown before the Court can make an order in relation to the vegetation, whereas in Queensland a single tree will suffice.

Submissions

5.4.69 Most submissions to IP 19 (5 of 7) supported including single trees and hedges in the definition of vegetation that is capable of grounding an application if legislation were to be adopted. The two submissions that did not agree were from Clarence Council and LGAT. Clarence Council did not provide reasons, but LGAT noted that most councils agreed that any legislation should only apply to hedge like structures as this was much like ‘a wall of a building and its impacts can be assessed in a similar way. Individual trees should not be considered at this point as there would be a far greater degree of subjectivity involved.’²⁸⁶

5.4.70 All 16 responses to this question in the submission template supported including both hedge-like structures and individual trees in any legislation that is adopted. In the reasons that were provided, most identified the fact that the issue was one of impact upon amenity and that such impacts could result equally from either a single tree or a hedge.

The Institute’s view

5.4.71 The legislation in NSW, which was the first state to adopt such legislation, requires that the vegetation that is causing the obstruction of sunlight or views include two or more trees that ‘are

²⁸⁴ Office of the Deputy Prime Minister (UK), above n 279. Similarly, in NSW the Land and Environment Court may require the initial pruning of a tree to be below the height at which the tree is ultimately to be maintained to allow for regrowth. See Land and Environment Court NSW, above n 222, 31.

²⁸⁵ The reviews of the relevant legislation in NSW and Queensland (currently underway) did not mention that this has been an issue. See QLRC, above n 55; Department of Justice and Attorney-General (NSW), above n 67.

²⁸⁶ Submission of LGAT (response to Question 11, IP 19).

planted ... so as to form a hedge.²⁸⁷ This jurisdictional test will be satisfied if the trees in question were planted, rather than self-sown²⁸⁸ or randomly planted,²⁸⁹ 'with the result or purpose of forming, a hedge.'²⁹⁰ This restrictive definition was perhaps motivated by concern that the Act could become a slippery slope leading to a flood of applications and potentially resulting in an excessive loss of vegetation in residential zones and the consequent creation of previously unknown legal rights. The definition of a hedge in the Act was revisited in the 2013 review of the Act. The review received several submissions that argued for the inclusion of single trees and against the requirement that such trees be purposely planted. In declining to recommend that the definition be amended, the review pointed out that the provisions pertaining to hedges were intended to provide a 'limited dispute resolution mechanism' and that to a lesser or greater degree, all trees have the potential to block sunlight or views. Further, in terms of the exclusion of vegetation that is self-sown, it was noted that there is less force to the argument that someone should be held accountable for obstructions caused by vegetation when it was not deliberately planted.²⁹¹

5.4.72 In contrast, the Queensland's *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* applies to any 'woody perennial plant' or to any plant that resembles a tree 'in form and size' and includes vines,²⁹² among other things. There is no restriction requiring two or more trees (of any particular type) to be planted so as to form a hedge like structure; a single tree that severely obstructs sunlight or views is sufficient to enliven the Tribunal's jurisdiction. The 2015 review of the Act (which at the time of writing has not yet concluded) did not ask whether this definition should be altered or restricted in any way.²⁹³

5.4.73 The approach in NSW seems to be based on an overriding concern that the application of the Act be strictly limited. Whereas the approach in Queensland seems to be based on the fact that, in reality, there may be no difference between the amount of obstruction of sunlight or views caused by either a 'hedge like structure' or a single tree.

5.4.74 The Institute prefers a definition that includes both single trees and hedge-like structures (or any other relevant type of vegetation) as in any given case there may be an equal impact upon amenity caused by the obstruction of sunlight or a view by the vegetation. To provide a remedy in one situation and not the other can appear to be arbitrary. The focus of the enquiry of the decision maker should be on the effect of the vegetation for both the owner and the neighbour. Similar considerations apply to whether or not the vegetation in question is self-sown; the Institute does not support including a requirement that the vegetation be planted with an element of 'purpose' (malicious or otherwise – see 5.4.48 above).

²⁸⁷ Section 4 of the *Trees (Disputes Between Neighbours) Regulation 2014* (NSW) includes bamboo and any plant that is a vine for the purpose of the definition in s 3(1) of the Act.

²⁸⁸ *Johnson v Angus* [2012] NSWLEC 192, [37] quoted in Land and Environment Court NSW, above n 222, 28.

²⁸⁹ *Cavalier v Young* [2011] NSWLEC 1080 quoted in Land and Environment Court NSW, above n 222, 29.

²⁹⁰ *Johnson v Angus* [2012] NSWLEC 192, [37] quoted in Land and Environment Court NSW, above n 222, 27.

²⁹¹ Department of Justice and Attorney General (NSW), above n 67, 13. The review also noted that the Act already dealt with trees that posed a danger and that to allow applications in relation to trees under the high hedge provisions would 'distort the jurisdictional limitations' in the earlier part of the Act: *ibid.* In the UK the legislation only applies to high hedges that are formed by a line of two or more evergreens or semi-evergreens: *Anti-social Behaviour Act 2003* (UK) c 38, s 66.

²⁹² *Neighbourhood Disputes (Dividing fences and Trees) Act 2011* (Qld) s 45.

²⁹³ The approach is similar in New Zealand where s 332 of the *Property Law Act 2007* allows a person to apply to the District Court in respect of any tree, shrub or plant that causes undue obstruction of a view or undue interference with the use and enjoyment of land by reason of shade or interference with access to light.

Recommendation 11

That any legislative scheme adopted to address this issue be applicable to single trees, hedges and other relevant vegetation, whether or not the tree, hedge or other vegetation is self-sown or purposely planted.

Zoning

5.4.75 Question 12 of IP 19 and submission template asked whether there should be any restrictions on the zoning of the property to which the legislation applies.

5.4.76 Originally, the provisions pertaining to obstructions of sunlight and views in the NSW legislation did not apply to land that was zoned ‘rural-residential’.²⁹⁴ The 2009 review of the Act, which recommended allowing the Land and Environment Court to hear disputes about high hedges, also recommended that the high hedge provisions not apply to land that was zoned rural residential. The review reasoned that, as the *Rural Vegetation Act 2003* (NSW) applied to vegetation in that zone, it was ‘important to ensure that the new procedure will not interfere with the broader environmental goals’²⁹⁵ of that Act. However, the review also recommended that this restriction be revisited in future. The subsequent review of the high hedge provisions in 2013 recommended extending the Act’s application to land that is zoned rural-residential.²⁹⁶ In recommending that the Act be extended to apply to rural residential land, the review noted that it was not anticipated that there would be any increase in the number of applications. This was because the general size of rural residential blocks meant that it was less likely that hedges planted on neighbouring land would interfere with the access of sunlight to a dwelling. The review also noted that most applications in respect of views from a dwelling involved water views, and as most land zoned rural residential is located inland, applications of this nature were unlikely to increase. The recommendations have been implemented and hedges (or trees) on land that is zoned rural residential are now subject to the Act.

5.4.77 In Queensland, the provisions in the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* do not apply to trees that are situated on rural land or to land that is more than four hectares.²⁹⁷ The 2015 review of the Act noted that [t]hese provisions may reflect a view that disputes about trees in larger rural blocks do not require the remedies provided for by the Act.²⁹⁸

Submissions

5.4.78 There was a mixture of views in IP 19 as to the zone to which any prospective scheme should apply. Clarence Council submitted that zoning, which affects the amenity value of a property, should be one factor in a list of non-exhaustive factors to which a court or tribunal should have regard when considering an application under any prospective scheme.²⁹⁹ LGAT submitted that there should not be any restrictions to the zoning. The remaining submissions were split between those that thought it appropriate to restrict the application of any such scheme to land that is zoned residential (two submissions noted that this could be expanded in the future) and those that did not think that there should be any such restrictions.

²⁹⁴ Section 4 of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) stated that the Act applied to trees situated on land including: ‘any land within a zone designated “residential”, “rural-residential”, “village”, “township”, “industrial” or “business”’. However, s 14A(2)(a) specifically excluded rural-residential land from the Part pertaining to obstructions of sunlight or views. Crown land was also excluded.

²⁹⁵ Department of Justice and Attorney-General (NSW), above n 59, 35.

²⁹⁶ Ibid. The Act was subsequently amended to incorporate this recommendation. See *Courts and Crimes Legislation Amendment Act 2015* (NSW) s 4.6.

²⁹⁷ *Neighbourhood Disputes (Dividing fences and Trees) Act 2011* (Qld) s 42(3)(a)-(b). The Dictionary Schedule to the Act provides that land is rural land if it is zoned as such by the *Land Valuation Act 2010* (Qld).

²⁹⁸ QLRC, above n 55, [3.33].

²⁹⁹ Submission of Clarence Council (response to Question 12, IP 19).

5.4.79 Of the 14 responses to this question in the submission template, most (8) did not think that there should be restrictions to the type of land to which such a scheme should apply.

The Institute's view

5.4.80 The Institute recognises that there may be legitimate concerns about the unduly broad application of any scheme that is implemented to address this issue. These concerns are essentially the same as those outlined above (see [5.4.51]): trees and hedges provide amenity and environmental benefits and property owners may wish to retain a tree or hedge on their property for a variety of legitimate reasons such as to provide privacy, shade or for aesthetics. However, if a scheme were to be adopted, then restricting its scope to land that is zoned residential would unfairly disadvantage those who reside outside this zone but who may nevertheless experience similar problems with neighbouring trees or hedges. Those living on land not zoned residential would be left with the inadequate remedies offered at common law.

5.4.81 The Institute considers that an appropriate balance between providing a remedy where required and ensuring that the application of any prospective scheme is not overly broad can be struck by requiring the decision maker to have regard to the zone (as defined in planning schemes) in which the land containing the disputed tree or hedge is situated. This would help ensure that any scheme that was enacted is applied appropriately on a case-by-case basis. For example, trees and hedges on land located in environmental living or management zones would most likely be excluded in all but the most egregious cases.

Recommendation 12

That any prospective scheme apply to land in any zone, but that the zoning of the land on which the tree or hedge is situated be a factor that must be considered by the decision maker.

Adjoining properties

5.4.82 Question 13 of IP 19 and the submission template asked whether there should be a requirement limiting applications to owners of adjoining properties.

5.4.83 In NSW, s 14B of the *Trees (Disputes Between Neighbours) Act 2006* restricts that Act's application in terms of trees that block the access of sunlight or views to those that are situated on adjoining land. The meaning of 'adjoining land' has been held to include land that is across the road from the affected property.³⁰⁰ While that interpretation was in respect of Part 2 of the Act (which relates to trees that cause or are likely to cause damage or injury), it has also been applied in respect of trees that block the access of sunlight.³⁰¹

5.4.84 In Queensland, the interpretation of 'adjoining land' in s 46(b) of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* includes land that adjoins the land on which the tree is situated or would adjoin the land if it were not separated by a road.³⁰²

5.4.85 In the UK, there is no requirement that a high hedge that is the subject of an application be on land that is adjoining the affected property. There is no restriction on where the hedge is situated as the focus is on the effect that the hedge is having on domestic properties:

³⁰⁰ *P Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128, [2]–[7]. See also *Robson v Leischke* [2008] NSWLEC 152, [157].

³⁰¹ *Cavalier v Young* [2011] NSWLEC 1080, [4]–[7].

³⁰² A road is defined in the dictionary to the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* as an 'area of land dedicated to public use as a road'. It also includes, among other things, a bridge or culvert or a pedestrian or bicycle path.

Although the Act describes where the hedge is growing as “neighbouring land”, the use of the word neighbouring has no special significance here. In particular, the hedge does not have to be next door. It could, in theory, be several gardens down the road. Though, in practice, the farther away a hedge is, the less its impact and the less chance that a complaint will be successful.³⁰³

However, as noted, the definition of a high hedge in the UK is quite narrow and only includes hedges that comprise ‘wholly or predominantly a line of two or more evergreen or semi-evergreen trees or shrubs.’³⁰⁴

5.4.86 In New Zealand, as in the UK, an application can be made in respect of a tree or shrub located on ‘any land’; there is no requirement that the vegetation be located on adjacent land. Unlike the UK however, applications are not restricted to a particular type of vegetation and can be made in respect of any tree or shrub.³⁰⁵

Submissions

5.4.87 Submissions to IP 19 were divided on whether there should be a requirement limiting applications to owners of adjoining properties. Of the seven submissions received by the Institute, four were in favour of such a restriction and three were against. Clarence Council and LGAT were both in favour of such a restriction. One submission that was against limiting applications to adjoining properties noted that there could be ‘endless’ arguments about what constitutes adjoining, and another noted that applications should be able to be made by either owners or occupiers.

5.4.88 Responses to the submission template were less divided, with the majority (10 of 13) selecting ‘no’ — applications should not be restricted to adjoining properties. Almost all of the comments provided similar reasoning for this choice: shading or the obstruction of views caused by trees or hedges could easily extend to non-adjacent properties. One response noted that the focus should be on the impact on the properties and not on whether or not they are adjoining.

The Institute’s view

5.4.89 The Institute recognises that allowing applications in respect of trees or hedges situated on non-adjoining properties could considerably expand the scope of those who may make an application and that this could possibly have deleterious results. However, the shade or obstruction of views caused by a tree or hedge can be the same regardless of whether the affected property is adjoining or not. In some cases, properties may be situated in very close proximity yet may not satisfy a requirement that they be adjoining. This situation occurred in *Bell v Griffiths*³⁰⁶ where an application for an order in respect of trees was refused although the boundaries of the properties in question were only three metres apart (the houses were approximately seven metres apart). The fact that there was a private driveway belonging to a third party between the disputants’ properties meant that the jurisdictional requirement that they be adjoining was not met.

5.4.90 The Institute prefers an approach that focuses on the effect produced by the tree or hedge rather than on a requirement that the properties be adjoining. Such an approach is likely to lead to more equitable outcomes. Logically, the further away a tree or hedge is from the subject dwelling the less likely it will be that it has an adverse effect on that dwelling. Requiring the decision maker to consider the location of the tree or hedge vis-a-vis the location of the property from which the

³⁰³ Office of the Deputy Prime Minister (UK), above n 228, [4.23].

³⁰⁴ Ibid [4.20].

³⁰⁵ *Property Law Act 2007* (NZ) s 332.

³⁰⁶ [2013] QCAT 655. The applicant argued that the driveway should properly be characterised as a laneway, and therefore qualify as a road which would have brought his property within the definition of an adjoining property. The Tribunal did not agree, pointing out that it was a driveway and therefore not for public use as required by the definition of a road in the Act.

application is made will help to provide an appropriate balance between the rights of property owners.’

Recommendation 13

- That applications in respect of trees or hedges that obstruct the access of sunlight or views not be restricted to properties that are adjoining.
- That there be a requirement for the decision maker to consider the proximity of the trees or hedges to the dwelling on the applicant’s property. If properties are not adjoining then it is less likely that an obstruction will be severe.

First in time

5.4.91 Question 14 of IP 19 and the submission template asked whether any prospective scheme should include a ‘first in time’ requirement, ie that the decision maker consider whether the tree or hedge existed prior to the applicant’s acquisition of the land. As IP 19 explained, “[f]irst in time” in this context refers to whether the hedge/tree impeding the view or sunlight existed prior to the applicant’s possession of the property; it is a principle that a court or tribunal ... must consider when making a decision. A first in time principle recognises that an owner who purchases property in the knowledge of an existing state of affairs should be bound by that existing state of affairs.³⁰⁷

5.4.92 In NSW, s 14F(b) of the *Trees (Disputes Between Neighbours) Act 2006* requires the Court to consider whether the trees existed prior to the dwelling that is the subject of the application (or whether there was some sort of alteration to the part of the dwelling which is the focus of the application). In recommending that provisions pertaining to high hedges be incorporated into the Act, the 2009 review noted that the Act should only apply to cases where the applicant themselves had lost the light or view: ‘It would not be appropriate, for example, for a person to purchase a property knowing there is a high hedge next door, and then be able to seek orders against their neighbours so as to gain additional solar access which had not existed at the time of purchase.’³⁰⁸ To account for cases where the trees were in existence but did not pose any discernible issues at the time the neighbour came to own or occupy the land, under s 14F(c) the Court must also consider whether the trees grew to a height of 2.5 metres or more during the relevant time.

5.4.93 *Davine v Beckitt*³⁰⁹ provides an illustration of application of the first in time principle in the NSW Act. In that case, planning approval was granted in 2005 for a second floor addition to a house, but the addition was not constructed until 2012. During the intervening period (and prior to the construction of the addition), the trees on the neighbouring property grew to a height that obstructed the potential view of the Sydney Harbour Bridge from the neighbouring property if a second floor addition was constructed. After the addition was constructed, the applicant sought orders from the Court that the trees on the neighbouring property be trimmed or removed as they were claimed to obstruct the view (and sunlight). In refusing to grant the application, the Court explained that as the applicant did not actually have those views (ie there was no second floor addition) at the time the trees grew to the height that they now stood, ‘the applicant has not lost a view that she actually enjoyed.’³¹⁰

5.4.94 In Queensland, in order to establish the unreasonable interference with the use and enjoyment of land by virtue of the severe obstruction of a view, the view must have existed when the neighbour first took possession of the land.³¹¹ This is a threshold requirement that must be met before the

³⁰⁷ TLRI, above n 11, [4.4.24].

³⁰⁸ Department of Justice and Attorney-General (NSW), above n 59, 35. See *McDougall v Philip* [2011] NSWLEC 1280.

³⁰⁹ [2013] NSWLEC 1067.

³¹⁰ *Davine v Beckitt* [2013] NSWLEC 1067, [35].

³¹¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66.

Tribunal can make an order in respect of a view. Therefore, if a tree severely obstructs a view from a neighbour's land but was 'first in time', the Tribunal cannot make an order in respect of that tree. The Tribunal has noted that while the date that the applicant took possession of the land is a question of fact and can be easily established, ascertaining the view that existed at that time is more problematic as applicants must produce evidence of the view that existed at that point in time.³¹²

5.4.95 In New Zealand, the court must take into account the whether the obstruction or interference that is complained of already existed when the applicant became the owner or occupier of the land.³¹³ This requirement will generally be a significant factor but is not determinative of the issue. The case of *Yandle v Done*³¹⁴ illustrates the Court's approach to this requirement. In *Done* the Court held that the fact that the tree or hedge complained of existed prior to when the neighbour first owned or occupied the land will be given considerable weight. The Court explained that a person who purchases a property with the knowledge of an existing problem cannot then expect the Court to assist in making the problem go away. The Court also noted that the purchase price may have reflected the existence of the problem and a purchaser could profit substantially 'if the problem was later removed with the assistance of the court.'³¹⁵ However, the facts of *Done* meant that an order in respect of the trees was warranted despite their presence at the time the property was purchased — particularly as the trees were not very high at the time of purchase.

Submissions

5.4.96 Most submissions to IP 19 (seven of ten) supported the inclusion of a requirement that the decision maker consider whether the tree or hedge existed at the time the applicant took possession of the property. Clarence Council argued that this should be included in a list of non-exhaustive factors that the decision maker should be required to consider as 'it would be unfair on the hedge grower to be compelled to remove or trim back a hedge that ... existed prior to the complaint taking possession'.³¹⁶ Clarence Council noted that first in time considerations reflect the idea that a property owner should take the property in the condition that he or she has purchased it. Similarly, other comments suggested that first in time considerations should be included, as a purchaser presumably has ample opportunity to inspect the property prior to purchase and, consequently, it would be unfair to then allow applications based on a situation of which a purchaser was well aware — particularly if the purchase price reflected that state of affairs. Of those that did not support the inclusion of first in time considerations, the only comment was that such a consideration would create an undesirable exception.

5.4.97 The responses to the submission template did not follow the same pattern as those to IP 19, with a majority (10 out of 16) indicating a preference for excluding first in time considerations. The most common comment amongst those that selected 'no' (that the decision maker should not be required to consider whether the tree or hedge existed at the time of occupation) was that any such vegetation might not have been visible at the time of purchase (eg it was behind a fence or wall) or, if it was, it might not have been thought of as potentially problematic at the time.

The Institute's view

5.4.98 The Institute recommends that in any prospective scheme there be a requirement that the decision maker consider whether the tree or hedge existed prior to when the applicant first occupied or purchased the property. To guard against a situation where an applicant purchases a property fully aware of an obstruction caused by neighbouring trees or hedges but subsequently seeks an order in

³¹² *Rice v Livingstone* [2014] QCAT 345, [3]–[5].

³¹³ *Property Law Act 2007* (NZ) s 335(1)(b)(ii).

³¹⁴ [2011] 1 NZLR 255, [86].

³¹⁵ *Ibid.*

³¹⁶ Submission of Clarence Council (response to Question 14, IP 19).

respect of that vegetation, as in New Zealand, the consideration of whether the trees or hedges were first in time could carry significant weight. However, the fact that the trees were there first may not always be determinative of the issue. An approach that requires the decision maker to consider first in time principles provides sufficient flexibility to account for situations where circumstances warrant that an order be granted despite that the tree or hedge was there first (for example if, at the time of purchase or occupation, the tree or hedge in question was not visible etc). This approach will also allow other considerations, such as the access of sunlight to rooftop solar panels to factor in the decision.

Recommendation 14

That the decision maker be required to consider whether the trees or hedges that are the subject of an application existed prior to the applicant's purchase or occupation of the dwelling.

Binding on successors in title

5.4.99 Question 15 of IP 19 and the submission template asked whether an order requiring action by an existing property owner in relation to a tree or hedge should be binding on successors in title and if so, to what extent?

5.4.100 In NSW the Act specifies that if the owner of land which is subject to an order under the Act ceases to be the owner of that land before the work is carried out, then the new owner of the land is bound by the order and is required to carry out the work if given a copy of the order by the applicant. However, in terms of the property that benefits from the order or application, the Act distinguishes between applications made under Part 2 (damage caused by trees) and Part 2A (trees the obstruct sunlight or views). In the case of the latter, successors in title to the applicant do not have the benefit of the original application and have to reapply to the Court.³¹⁷

5.4.101 The question of the binding effect of QCAT orders on subsequent owners is dealt with in Part 7 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* — Sale or proposed sale of affected land. These provisions provide a detailed regime for what is to occur in the event that land which is subject to an application or an order under the Act is to be sold. For example, the Act specifies that if a prospective buyer is provided a copy of an application by the person who is selling the affected land, then the buyer becomes a party to the proceedings; if the buyer is provided a copy of an order by the person who is selling the affected land, then once the transfer is complete, the buyer becomes bound by the order to the extent that the order has yet to be fulfilled.³¹⁸ In Queensland there is no provision limiting the effect of applications or orders to immediate successors in title. However, s 78 of the Act specifies that an order made under Chapter 3 (trees) will lapse after 10 years from the day on which it was made unless the order expressly provides otherwise.³¹⁹

³¹⁷ *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 16(1A).

³¹⁸ If land that is subject to an application or order is to be sold and the seller does not provide a copy of the application or order to the buyer prior to entering into a contract for the sale of the land, then the buyer may terminate the contract. If the contract is terminated, the buyer and the person who prepared the contract are liable for the reasonable legal and other expenses incurred by the buyer. If the sale goes through and the former owner has not supplied a copy of an order to the buyer, she or he remains liable to carry out the work under the order despite no longer owning the land: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* ss 86, 87. The QLRC's review of the Act identified that this provision did not cover the situation where an application was made to QCAT after a contract for the sale of land had been entered, and asked whether this section should be amended to cover this situation. See QLRC, above n 55, [3.154].

³¹⁹ Under s 78 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, the Tribunal can also revoke an order on application or on its own initiative.

Submissions

5.4.102 Seven of the nine submissions to this question in IP 19 supported making existing orders in relation to trees or hedges binding on successors in title. However, most submissions did not indicate to what extent such orders should be binding. LGAT submitted that successors in title should be bound by existing orders, but Clarence Council did not, arguing that that as owners changed, so too did circumstances and opinions and that it is possible that a new owner might not have any issue with the hedge or tree. Further, the Clarence Council pointed out that it could be prohibitive for a property owner to have such a restriction on the title in the event that they wished to sell the land.³²⁰ One submission stressed that in making orders binding on subsequent title holders, it was important that existing orders be disclosed to purchasers (whether or not the land being purchased had benefitted from or been burdened by such an order).

5.4.103 All 17 submissions to the submission template supported making existing orders binding on successors in title. A number of responses indicated that this would be a logical approach as it would obviate the need for a neighbour to reapply for an order every time land that is subject to an order changed hands.³²¹ In terms of the extent to which such orders should be binding, some responses indicated that orders should be binding in perpetuity or that they should ‘run with the land’.

The Institute’s view

5.4.104 The issue of the effect of orders on future owners of land was discussed in the 2009 review of the NSW Act, where it was pointed out that, given that the procedures in that Act were aimed at resolving hedge disputes between particular neighbours, ‘[c]reating approximations of a right to a view or to solar access, or allowing orders to run with the land indefinitely, would be inconsistent with the aims of the dispute resolution procedure’.³²² It was argued that as the dispute is between the particular neighbours, any order made in respect of a hedge should apply only to the hedge owner and the hedge owner’s immediate successor in title.³²³ While the Institute agrees with the premise that such disputes are between particular landowners (or occupiers) and that the creation of approximations of a right to a view or solar access should be avoided, the Institute’s view is that the NSW and Queensland responses in terms of binding future owners of the land are unnecessarily complex. A simpler framework, where only the original disputants are bound is both practical and accords with the Institute’s view that the legislation should have, at its heart, the resolution of a dispute between current neighbours. It is possible that a new owner will prioritise privacy and/or access of sunlight and a view differently than the previous owner. However, in the event that the land from which a successful application originated is sold, the prior existence of the order should be a factor in any subsequent decision made in respect of the same tree or hedge. In order to facilitate the discovery of past orders by prospective purchasers, a searchable register of tree or hedge orders should be made available to the public.³²⁴

Recommendation 15

- That orders made in respect of trees or hedges are not binding on subsequent owners of the land to which the order relates.
- That a publicly available database of orders that are made in respect of trees or hedges be established.

³²⁰ Submission of Clarence Council (response to Question 15, IP 19).

³²¹ Eg submission of Ovie Taylor (in response to Question 15 of Submission Template).

³²² Department of Justice and Attorney-General (NSW), above n 59, 37.

³²³ Ibid.

³²⁴ Such a register is used in Queensland: see QCAT, *Tree Orders Register* (2015) <<http://www.qcat.qld.gov.au/matter-types/tree-disputes/tree-order-register>>; In NSW decisions of the Land and Environment Court that pertain to trees are published through several outlets including the online NSW Caselaw database: <<https://www.caselaw.nsw.gov.au/>>.

Responsibility for the costs of carrying out orders and for proceedings

5.4.105 IP 19 (and the submission template) asked how costs should be allocated, but only in relation to a scheme where the application was made to a local council. This was because, as IP 19 noted, legislation pertaining to a court (or tribunal), generally sets out how costs are to be allocated and what considerations may be relevant in deciding if, and how, costs should be awarded. For example, s 28 of the *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) provides that each party is to pay their own costs unless circumstances warrant otherwise, such as whether the application was frivolous or vexatious.³²⁵ Similar considerations apply in the Magistrates Court.³²⁶

5.4.106 While this Final Report has not recommended that a scheme be adopted where applications are made directly to a local council (see [5.4.10]–[5.4.13] above), the positions in NSW and Queensland provide useful guidance if the allocation of costs in disputes about trees or hedges are deemed to warrant different considerations than those already in place in the relevant legislation. Moreover, the Institute received a high number of submissions in respect of this question and most are of general application; that is, they do not necessarily pertain only to the allocation of costs where an application is made to a local council. Therefore the issues raised in these submissions are considered below.

The law in other jurisdictions

5.4.107 *New South Wales*: Section 14D(2)(h) of the *Trees (Disputes Between Neighbours) Act 2006* allows the Court to require the payment of the cost of carrying out an order made under the Act. In this regard, the usual practice is that if an application is successful, the *respondent* will meet the costs of carrying out the Court's orders.³²⁷ However, this will depend on the circumstances of the case and the Court can make what orders it thinks fit to remedy the situation, including apportioning responsibility to pay for the work to be undertaken or requiring the applicant alone to pay.³²⁸ Commissioners do not have the power to award the costs involved in carrying out the proceedings.³²⁹ However, a party to a tree dispute may apply for such costs to be awarded.³³⁰

5.4.108 The cost of proceedings in NSW can be affected by the use of legal representation, which is permitted by the *Land and Environment Court Act 1979*.³³¹ However, as noted above lawyers are not used in 75 per cent of applications made in respect of hedges (see [4.2.8]). In order to help keep costs in check, the Court encourages parties to consider whether experts are genuinely necessary and to that end will, in most cases, appoint at least one Commissioner who is an arborist.³³²

5.4.109 *Queensland*: QCAT can make any orders that it considers appropriate in relation to a tree. The Act specifically sets out that the Tribunal can require the tree-keeper or the applicant to pay the

³²⁵ See *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) s 28(3)(a)–(i).

³²⁶ See *Magistrates Court (Civil Division) Act 1992* (Tas) s 31AF. The Court may award compensation to a party in relation to a minor civil claim if it determines that the claim is frivolous or vexatious.

³²⁷ *Nicolson v Fekete & anor* [2012] NSWLEC 1281, [26]: '[A]s usual in these matters, the costs of carrying out the orders are to be at the respondents' expense.'

³²⁸ See Land and Environment Court NSW, above n 222, 32. See also eg, *Datt & anor v Fevre & anor* [2013] NSWLEC 1037, [45] (apportionment of costs); *Kumar & anor v Song & anor* [2015] NSWLEC 1374, [42] (apportionment of costs); *Price & anor v Harrison & anor* [2013] NSWLEC 1149, [32] (applicant pays – by consent).

³²⁹ Land and Environment Court NSW, above n 222, 17. This includes the cost experts, reports, application fees and personal expenses: *Colling v Wilson* [2009] NSWLEC 1061, [2]–[3]. See also eg *Goodwin v Haddad & anor* [2014] NSWLEC 1145, [2]; *Hazlewood v Paton* [2013] NSWLEC 1208, [20]. At the time of writing, filing an application in respect of a tree dispute in NSW costs \$234. This is discounted from the usual \$897 fee for Class 2 applications.

³³⁰ See *Land and Environment Court Rules 2007* (NSW) r 3.7; see also Land and Environment Court of NSW, *Practice Note – Class 2 Tree Applications* (2014) [55]–[56].

³³¹ See s 63.

³³² Land and Environment Court of NSW, above n 330, [41]–[50].

costs associated with carrying out an order made under the Act.³³³ In terms of the costs of carrying out the proceedings, s 100 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) specifies that each party should usually bear that party's own costs.³³⁴ However, there are a number of exceptions in the Act that allow the Tribunal to apportion the costs of proceedings to either one or the other party if it would be in the interests of justice to do so.³³⁵

5.4.110 In order to keep the cost of proceedings low, the Tribunal will generally appoint an expert tree assessor rather than have the parties engage their own experts. The Tribunal may require one or both parties to pay all or part of the cost of the assessor.³³⁶ Additionally, legal representation in matters before the Tribunal is not allowed unless the interests of justice dictate otherwise.³³⁷

5.4.111 *New Zealand*: Under s 337(2) of the *Property Law Act 2007* (NZ), the *applicant* is required to pay for the work ordered by the court unless the court thinks that the defendant should contribute to or entirely pay for the work.

Submissions

5.4.112 Submissions to IP 19 were divided on the issue of how the burden of costs resulting from an application should be apportioned. A number of submissions argued that costs should be allocated according to the success of the application — that is, if the application is successful then the respondent (tree owner) should pay; if not, then the applicant should be responsible for the associated costs. This position was supported by LGAT, which noted that such an arrangement could have the advantage of discouraging vexatious applications and could encourage the parties to settle the dispute by other means before applying for formal resolution of the matter. On the other hand, Clarence Council thought that the question of costs should be left to the discretion of the court or tribunal to apportion as it sees fit, arguing that such a body will have the necessary expertise in such matters. Other submissions argued that as it is the applicant who stands to benefit from a successful application, he or she should bear any relevant costs associated with the application. The responses to the submission template were similarly divided.

The Institute's view

Costs of complying with an order

5.4.113 In respect of paying for the work associated with an order made in relation to a tree or hedge, the Institute notes that there is currently a diversity of approaches with New Zealand preferring the responsibility for the work to be placed on the applicant, whereas in New South Wales the tree-keeper is more likely to be responsible for the costs of the order. The Institute's view is that the cost of complying with an order should be primarily a matter left for the consideration of the decision maker. This approach is preferable as it affords sufficient flexibility for the decision maker to tailor orders to suit the circumstances of a particular case.

³³³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(e). An applicant can also claim up to \$300 per annum in reimbursements for work carried out under the Act's overhanging branches provisions. See ss 55–58 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld). This amount can be recovered as a debt in minor civil dispute proceedings.

³³⁴ At the time of writing, filing an application in respect of a tree dispute in Queensland costs \$305: Queensland Civil and Administrative Tribunal, *Fees and allowances* (2015) <<http://www.qcat.qld.gov.au/using-qcat/fees-and-allowances>>.

³³⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102.

³³⁶ See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 110–112. See also, Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 – Arrangements for Applications for Orders to Resolve Other Issues About Trees*, 1 July 2013.

³³⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43. See also Queensland Civil and Administrative Tribunal, *Legal advice and representation* (24 August 2015) <<http://www.qcat.qld.gov.au/using-qcat/legal-advice-and-representation>>.

Costs of legal proceedings

5.4.114 In respect of recovering the costs associated with the proceedings, the Institute does not believe that departure from the position that parties should bear their own costs is warranted. This would mean that the applicant would be responsible for the application fee, but that each party would be responsible for the costs involved in conducting the proceedings. However, this should be tempered by certain exceptions. For example, the costs associated with bringing the proceedings should not be awarded unless the court or tribunal considers that there are circumstances that justify doing so, such as that the application was vexatious or frivolous.

5.4.115 In order to minimise the costs associated with proceedings in respect of trees or hedges, consideration should be given as to whether legal representation should be permitted as a matter of course. In this regard, the Institute notes that generally, legal practitioners are not to represent parties in minor civil claims in the Magistrates Court.³³⁸ Equally, the feasibility of the use of court or tribunal appointed experts should be considered in order to help lower costs for the parties.

Recommendation 16

- That the decision maker be given discretion to allocate the burden of any costs associated with carrying out an order in respect of a tree or hedge to either the applicant or the respondent or to both the applicant and the respondent.
- That a party's costs in relation to the proceedings be borne by that party unless circumstances warrant the allocation of those costs (or some portion thereof) to the other party.
- That consideration be given as to whether legal representation be permitted as a matter of course and whether, if required, experts be provided to the parties by the relevant decision making body.

Interaction with other laws

5.4.116 IP 19 noted that trees or hedges may be subject to regulation under other branches of law and that the various jurisdictions surveyed used different methods to manage the interaction of those laws with laws enacted to deal with problem trees or hedges.

5.4.117 In Queensland, tree orders made under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*(Qld) are given precedence over relevant local laws:

67 Scope of order to override other laws

- (1) If QCAT is satisfied the application before it was made because of a genuine dispute, it may make an order for a person to carry out work on a tree even though—
 - (a) consent is withheld by a local government or a tree-keeper under a vegetation protection order; or
 - (b) a local law requires a consent or authorisation to be given before the work may be carried out; or
 - (c) the work is otherwise restricted or prohibited under a local law.
- (2) Work carried out under an order made under subsection (1) is lawful despite a local law.
- (3) Except as provided under subsection (1), QCAT may not make an order for a person to carry out work on a tree that is prohibited under another Act.

³³⁸ *Magistrates Court (Civil Division) Act 1992* (Tas) s 31AD.

5.4.118 The consultation held in Queensland prior to the adoption of the Act reveals that local laws were ‘deliberately excluded, because it is the specific intention of the Bill that QCAT can override a local law, particularly relating to vegetation protection orders, where it can be demonstrated that the tree is a nuisance.’³³⁹ However, the Act does not override laws such as the *Queensland Heritage Act 1992* (Qld), which protects trees that have ‘particular cultural heritage significance’ or any other relevant Act (other than provided for in s 67). Before the Tribunal can make an order in respect of a tree or hedge, s 65(b) requires that the neighbour must have taken all reasonable steps to resolve the issue ‘under any relevant local law, local government scheme or local government administrative process’ including any local laws that pertain to the tree or hedge.

5.4.119 The NSW legislation is similar to that in Queensland in that it accords priority to an order made by the Court over any applicable council requirements³⁴⁰ such as tree preservation orders.³⁴¹ The Court has considered the operation of these provisions in *Haindl v Daisch*³⁴² and concluded that where a council had consistently applied a tree preservation order policy, then under s 14F(d) the Court should give significant weight to tree preservation policy when determining an application (in this case in respect of a view). The Court pointed out that although such policies should be given significant weight, they could not be given ‘determinative’ weight ‘as to do so would be contrary to the broad intention of the legislation that obviously sets up a mechanism to override such instruments as Tree Preservation Orders (by the insertion of s 6(3))’.³⁴³

Submissions

5.4.120 Submissions to IP 19 were divided between those that supported giving primacy to orders made in respect of trees or hedges and those that thought that other regulations and by-laws should take precedence. Clarence Council submitted that, in any prospective scheme the court or tribunal should be required to consider whether the vegetation in question is subject to the provisions of any other legislation, such as that which relates to heritage. LGAT was of the view that the court or tribunal should be required to seek information from the relevant local council in respect of a tree or hedge that is subject to an application:

any legislation should require the Court, once an application is made, to request the relevant local Council to furnish it with formal advice that the property which is the subject of the application is or isn’t affected by a heritage listing, tree preservation order, threatened species habitat or any other matter that, in the Council’s opinion, believes may be of relevance to the Court’s determination of the application.

Most (8 of 12) responses to the submission template indicated a preference for granting precedence to local by-laws, regulations or rules, such as those relating to heritage or wildlife, over any order made in respect of a tree or hedge.

³³⁹ Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, above n 265, 10.

³⁴⁰ In NSW s 6(1)(a) of the *Trees (Disputes Between Neighbours) Act 2006* provides that an order made under the Act in relation to the obstruction of sunlight or views does not authorise or require a person to ‘engage in any activity for which a consent or other authorisation must be obtained under any other Act without that consent or authorisation’. However, s 6(3) creates an exception to this; it states that tree orders will have effect ‘despite any requirement that would otherwise apply for a consent or other authorisation in relation to the tree concerned to be obtained under the *Environmental Planning and Assessment Act 1979* or the *Heritage Act 1977*.’ In addition to these requirements, under s 14F(d), before determining an application the Court must consider whether in the absence of s 6(3) authorisation or consent would be required to interfere with the trees under the *Environmental Planning and Assessment Act 1979* (NSW) or the *Heritage Act 1977* (NSW).

³⁴¹ Land and Environment Court NSW, above n 222, 6. However, before determining an application in relation to trees that block access of sunlight of views, under s 14F(d) the Court is required to consider whether, in the absence of s 6(3), authorisation or consent would be required under the *Environmental Planning and Assessment Act 1979* or the *Heritage Act 1977* and under s 14F(e) whether any there are any other development consent requirements or conditions pertaining to the land on which the trees are situated.

³⁴² [2011] NSWLEC 1145, [94]–[103].

³⁴³ *Haindl v Daisch* [2011] NSWLEC 1145, [100].

The Institute's view

5.4.121 Given the large number of relevant rules, regulations or by-laws that may apply to a particular tree or hedge, the Institute recommends that a strategy similar to that in place in NSW and Queensland be adopted. The Institute agrees that in considering an application in respect of a tree or hedge, the decision maker should be required to have regard to any applicable authorisation that would otherwise be required under another law. If such an authorisation would normally be required (and has not been obtained) then this should weigh against the making of an order. Providing the decision maker with this flexibility should help strike a reasonable balance between ensuring that the objectives of the scheme are met, and that any environmental, heritage or other relevant conditions relating to the tree or hedge are considered before an order is granted.

Recommendation 17

That prior to granting an order, the decision maker be required to consider whether authorisation to interfere with the tree or hedge would otherwise be required under another law.

5.5 Option 4: Extension of the abatement notice provisions under the *Local Government Act 1993 (Tas)*

5.5.1 Issues Paper 19 and the submission template asked: 'If a local government model is adopted should new legislation be developed or should provisions be incorporated in the abatement notice provisions of the *Local Government Act 1993*?'

5.5.2 Issues Paper 19 set out the procedure for issuing an abatement notice under the *Local Government Act 1993 (Tas)* (see 2.2.12 above) and then noted that '[i]t is possible that this system could be extended to include hedges that block access to sunlight and/or to a view. Under this model, legislative provisions relating to trees would not be in a separate Act but, to a large extent, would adopt the notice provisions and appeal processes that already exist for abatement of nuisances under the *Local Government Act*.'

Submissions

5.5.3 Three of the seven submissions made to IP 19 supported incorporating any such provisions into the *Local Government Act*. However, these submissions did not provide substantive reasons for this choice. On the other hand, Clarence Council, which strongly opposed this model, echoed the arguments that it made in opposition to the model that suggested local councils be the primary decision makers in tree and hedge disputes (see [5.4.6] above). The main thrust of this argument is that it is inappropriate for councils to act as decision makers in private disputes between two neighbours as this is 'contrary to the [requirement] of councils to act in the interest of the public.' Further, Clarence Council argued that 'council resources should be deployed for the community not private benefit' and pointed out that this option 'would be further complicated of the offending tree/hedge was on council land.'³⁴⁴ Similarly, LGAT reaffirmed its position that it did not support any model that made councils responsible for the administration and enforcement of any such scheme. It did note however, that local government was 'willing to be a place where people may obtain information on the issue of high hedges and on the legislation that applies to dispute resolution in much the same way as it currently provides information of the *Boundary Fences Act 1908*.'³⁴⁵

³⁴⁴ Submission of Clarence Council (response to Question 18, IP 19).

³⁴⁵ Submission of LGAT (response to Question 18, IP 19).

5.5.4 Of the eight responses to this question in the submission template, three submitted that separate legislation should be required, and five were of the view that extending the abatement notice provisions in the *Local Government Act* would be more appropriate.

The Institute's view

5.5.5 The Institute supports LGAT's submission that if a legislative scheme is adopted, local councils be employed to provide information about hedges and trees and about the resolution of any such issues to the public.

5.5.6 However, for the reasons outlined above in relation to Question 3 (see [5.4.10]–[5.4.13] above), the Institute does not support a model that involves local councils in any decision making capacity either through the extension of the abatement notice provisions in the *Local Government Act 1993* or through the development of discrete legislation.

Recommendation 18

- That the abatement notice provisions in the *Local Government Act 1993* (Tas) not be extended to cover tree or hedge disputes between private landowners.
- That if separate legislation is implemented, local government not be made responsible for tree or hedge disputes.
- If a scheme is adopted, that consideration is given to providing local government with the relevant means to inform the public about trees and hedges and the settlement of disputes under any such scheme.

5.6 Option 5: A hybrid or alternative option?

Submissions

5.6.1 Only four submissions across both IP 19 and the submission template addressed this question. And while all four submitted that a hybrid options should be adopted, only one submission provided substantive reasons.

5.6.2 LGAT noted that during local government forums, several alternatives or hybrids were discussed and that there was,

agreement that there should be a legal remedy available to any home owner regardless of where they live. It was also agreed that the legal remedy should be a last resort, having first exhausted options such as mediation. There must be some form of threshold test and awarding of costs to the unsuccessful party.

It was also suggested that if any reform is made that it include the form of granting rights to trim vegetation on or within a distance of the boundary down to a certain height, perhaps a similar process to that under the Boundary Fences Act where people can serve notice on their neighbour that they intend to do so, and that this process be separate and independent of involvement of Council. Disputes under the Boundary Fences Act are dealt with in the Magistrates Court Civil Division where there is a tried and true mediation/conciliation process which can often deal with the matters without trial or hearing and with minimised cost. Any other disputes of nuisance etc that are not directly Boundary Fences Act can also fall within the jurisdiction of that Court and be dealt with through the Court case management process.

Consequently a number of councils commented on the opportunity to link into the review of the Boundary Fences Act and dispute resolution mechanisms proposed there and include these issues in any new Act.³⁴⁶

The Institute's view

5.6.3 The Institute notes that a statutory means for dealing with overhanging branches on neighbouring land was implemented in Queensland through the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*. Sections 55–58 of that Act provide ‘a process by which a neighbouring landowner can request the tree-keeper by notice to carry out the work on the tree at the cost of the tree-keeper.’ However, these concerns fall largely outside the terms of reference for this project and the Institute makes no recommendations in respect of them.

³⁴⁶ Submission of LGAT (response to Question 19, IP 19).

Appendix A

Online survey:

The online survey comprised five questions:

1. Have you ever had a dispute with a neighbour about a hedge or similar vegetation that is blocking light or a view?
2. If you answered 'yes' to the previous question, were you able to resolve the dispute amicably between yourselves?
3. If you answered 'no' to the previous question, did you (or your neighbour) resort to other measures to resolve the dispute? If so please indicate what other measures were taken.
 - Informal third party involvement
 - Formal mediation
 - Sought legal advice
 - Instituted legal proceedings
 - Considered employing 'self-help' (eg by trimming the vegetation yourself)
 - Other (please provide details)
 - Did not resort to other measures
4. Whether or not you have personally been affected by a 'problem hedge', do you consider that a more formal process for resolving such disputes is needed? (You may include additional comments in the space provided).
5. What is your postcode?

Question 1: There were a total of 137 responses³⁴⁷ to Question 1 ('have you ever had a dispute with a neighbour about a hedge or similar vegetation that is blocking light or a view'). Of those, 82 per cent (n=113) indicated that they had had such a dispute with a neighbour, while 17 per cent (n=24) indicated that they had not had a problem of this nature with a neighbour.

Question 2: There were 134 responses to Question 2³⁴⁸ ('if you answered 'yes' to the previous question, were you able to resolve the dispute amicably between yourselves?') Sixty three per cent (n=84) answered 'no'; ie they were unable to amicably resolve their dispute, and only seven per cent (n=10) answered 'yes', they were able to amicably reach a solution.³⁴⁹ Of the remaining respondents,

³⁴⁷ While there were 153 responses in total to the survey, not all respondents answered each question. For example, at Question 1 there were 13 responses classified as 'not completed' and three classified as 'no answer' leaving a total of 137 responses.

³⁴⁸ While 113 respondents answered 'yes' at Question 1, indicating that they had had a relevant dispute with a neighbour, there were 134 total (valid) responses to Question 2 (which was directed at those who had responded with 'yes' at Question 1). This discrepancy can be explained by the 21 respondents who chose 'no' at Question 1, but then chose 'not applicable' at Question 2. If the percentages are recalculated to discount those that answered 'no' at Question 1 but then chose 'not applicable' at Question 2, the results for Q2 are as follows: Total respondents = 113. Eight per cent (n=10) said they were able to resolve their dispute; 74 per cent (n=84) were unable to resolve their dispute; and 18 per cent (n=19) indicated that they did not try to resolve their dispute.

³⁴⁹ The remaining respondents either indicated that they did not attempt to resolve the dispute (19 or 12 per cent); the question was not applicable (21 or 14 per cent); or they left the question unanswered (17 or 11 per cent).

14 per cent (n=19) indicated that they did not attempt to resolve the dispute and 16 per cent (n=21) indicated that the question was ‘not applicable’.

Question 3: Question 3 asked, ‘[i]f you answered ‘no’ to the previous question, did you (or your neighbour) resort to other measures to resolve the dispute? If so please indicate what other measures were taken.’ Respondents could then select from a list of measures (see Table 2 below) and were invited to provide further comments.³⁵⁰ The percentages in Table 2 below are based on the 129 completed responses to this question.

Table 2: Types of measures and frequency of use³⁵¹

Type of Measure	Number	Per cent
Informal third party involvement	24	18%
Formal mediation	3	2%
Sought legal advice	30	23%
Instituted legal proceedings	3	2%
Considered employing ‘self-help’ (eg trimming vegetation yourself)	45	35%
Other	44	34%
Did not resort to other measures	18	14%
Not applicable	16	12%

The comments that accompanied Question 3 are summarised below:³⁵²

- Fifteen respondents selected ‘informal third party involvement’ and left a comment. Of those, 12 stated that they had sought advice from their local Member of Parliament, local council or both. Given that the question was directed to those who were unable to resolve their problem with their neighbour, it can be assumed that these respondents were unable to resolve the problem despite seeking help from a third party.
- Nine respondents selected ‘sought legal advice’ and left a comment. None of these comments indicated that the dispute was resolved through this means. In fact, four respondents commented that their solicitors had told them that, legally, there was little or nothing that they could do about this issue.
- Ten respondents selected ‘considered employing “self-help” (eg trimming vegetation yourself)’ and left a comment. Eight of these indicated that they had either trimmed the trees themselves or had hired a contractor to do so. One respondent indicated that he or she had received a letter from the neighbour’s lawyer after trimming the trees in question and another related how a neighbour had trimmed trees in her or his yard without permission. One respondent indicated that they had thrown the green waste back over the fence.
- Forty-two respondents chose ‘other’ and left a comment. The substance of the majority of these comments was that an approach had been made to the neighbour about the problem

³⁵⁰ Respondents could choose more than one measure therefore the total does not equal 100 per cent.

³⁵¹ Some respondents reported that they had used more than one option. The remaining 24 respondents did not complete this question.

³⁵² There was one comment in relation to ‘formal mediation’, three comments in relation to ‘instituted legal proceedings’, four comments in relation to ‘did not resort to other measures’ and one comment in relation to ‘not applicable’.

but that the problem remains unresolved. These comments also revealed that there were a number of respondents (n=5) who could best be described as having employed ‘self-help’ measures. For example, several respondents commented that they had either trimmed or pruned the vegetation in question. In two instances anonymous comments revealed that respondents had resorted to self-help in removing a neighbour’s hedges or trees.³⁵³

Question 4: There were a total of 127 responses to Question 4 (‘[w]hether or not you have personally been affected by a “problem hedge”, do you consider that a more formal process for resolving such disputes is needed?’) Eighty-eight per cent (n=112) thought that a more formal process should be introduced, while 12 per cent (n=15) did not think that any such process was necessary.

Respondents to this question were also invited to leave additional comments:

- Fifty-six of the 112 respondents who indicated that they thought that some form of additional regulation is required left a comment. The most frequent comment was, in essence, that the law in this area is deficient and there are no effective means for resolving disputes of this nature. For example, one respondent noted that while buildings (generally) require council approval, planting hedges along a boundary does not. Another suggested that the common law is insufficient and that legislation is required to deal with these types of disputes.
- Five of the 15 respondents who selected ‘no’ (a more formal process is not required) left a comment. One respondent pointed out that regulation (over and above the current common law and relevant legislation) could have negative impacts on wildlife habitat and amenity. Another commented that although he or she was against the enactment of additional laws, formal guidelines as to what constitutes a problem hedge would be a good idea.

The final survey question asked respondents to provide their postcodes. Most of the survey respondents were located in the main population centres in both the north and south of the state, with the division in the numbers of respondents from these two areas roughly equal. In the north, the suburbs surrounding Launceston and Devonport had the highest number of respondents. The local council areas that had the greatest number of respondents in the south were located on the eastern shore of Hobart — which is the location of the hedge that was the genesis of this project.³⁵⁴

³⁵³ Apart from the submissions received by the Institute that noted such activities, a similar incident involving at least 39 trees was reported during the preparation of this Report. See Browning, ‘Dozens of trees poisoned in public park in Kettering an act of “environmental vandalism”; trees block water views of nearby houses’, *Australian Broadcasting Corporation* (online), 8 October 2015 <<http://www.abc.net.au/news/2015-10-08/dozens-of-trees-poisoned-in-public-park-in-kettering/6836514>>.

³⁵⁴ The council areas with the most respondents were Clarence (34); Launceston (18); Hobart (13); Central Coast (10); Kingston (10); Devonport (8).